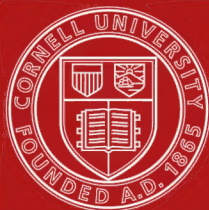


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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF CHANCERY
OF THE
STATE OF NEW YORK.

BY
OLIVER L. BARBOUR,
COUNSELLOR AT LAW.

SECOND EDITION,
WITH NOTES AND REFERENCES, BY
STEWART RAPALJE.

VOL. II.

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CHANCELLOR, VICE CHANCELLORS.
ND
ASSISTANT VICE CHANCELLORS

DURING THE TIME OF THE FOLLOWING REPLETTS.

Chancellor.
REUBEN H. WALWORTH.

Vice Chancellors and Assistant Vice Chancellors.

FIRST CIRCUIT,
LEWIS H. SANDFORD, V. C.
ANTHY L. ROBERTSON, A. V. C.

SECOND CIRCUIT,
SEWARD BARCULO.

THIRD CIRCUIT,
AMASA J. PARKER.

FOURTH CIRCUIT,
JOHN WILLARD.

FIFTH CIRCUIT,
PHILO GRIDLEY.

SIXTH CIRCUIT,
HIRAM GRAY.

SEVENTH CIRCUIT,
BOWEN WHITING.

EIGHTH CIRCUIT,
FREDERICK WHITTLESEY.

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CASES IN CHANCERY.

THE SENECA WOOLLEN MILLS vs. TILLMAN.

A., the defendant, the owner of a water power in the Seneca river, sold to the complainants, for the use of their mills, &c. a portion of such water power, and conveyed the same by a deed which described the subject matter of the grant, and the extent of the right granted, as follows: "All and singular the water power, water rights, and right to use the waters of the Seneca river, or outlet, for hydraulic purposes, particularly described as follows: being part of the water power and water rights belonging and appertaining to certain lands lying and being in the place aforesaid, on the south side of the Seneca river, conveyed by C. to the said A., to which lands there is now appurtenant the right of drawing, and using for hydraulic purposes, one-half of the surplus waters of the Seneca river, or Cayuga and Seneca canal, belonging to the said A., except the right of drawing and using sufficient water to propel two run of flouring millstones, as conveyed to F. by said A. And the grant of water power and water rights, hereby intended, is the right of drawing, using, occupying and enjoying forever, for hydraulic purposes, sufficient of the waters of the said Seneca river, or surplus waters of the said canal, so as aforesaid belonging to the said A., to propel five run of millstones used for flouring wheat, with the necessary machinery attached thereto, by the most approved wheels, *to be drawn, used, and enjoyed, upon an equality of right with three other like run of millstones, to be used by the said A., his heirs and assigns*; which said five run and three run of millstones shall have preference in the use of the water above described, over the remaining rights now belonging to the said A." The company subsequently acquired the title to four-sixth parts of the privilege of using the water for the two runs of stones which had previously been granted by A. to F.; and an inchoate right to the other two-sixth parts of that privilege, under a sheriff's sale thereof, but the time of redemption as to those two-sixths had not expired.

Held, that the rights of the parties, under the deed of conveyance, and the previous grant to F., were as follows: That the two run power previously granted to F. must be first satisfied. And that so far as the company had acquired that water power, its right to use it was exclusive of the defendant A. That while the company, or the owner of the other two-sixths of the two run power, were in the use of that water power, the defendant was not at liberty to use the water, or to suffer it to run to waste, so as in any way to interfere with, or impair, that right.

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Held further, that after supplying that two run power, or so much thereof as the parties owning it wished to use, according to their several rights therein, if there was not sufficient surplus water, on that side of the river, at the upper level, to propel eight runs of millstones, exclusive of the half of the surplus waters, or so much of that half as was actually used on the north side, the complainant and defendant must participate in the use of such surplus, in the proportion of five parts to the former and three parts to the latter. And that, in the estimate of the water power used by each, there must be included so much of the surplus water as was suffered to run to waste, by the negligence of the parties, respectively; or by their suffering the flumes or other works, which they were severally bound to repair, to be out of order.

Held also, that in no event had the defendant the right to use more than a proportional part of his three run water power, until the machinery of the complainants was fully supplied, to the extent of a six and one-third run power. And that he had not the right, by running his saw mill in the night time, in dry seasons, so to draw down the surplus waters of the upper level as not to leave, for the complainants, their proper proportion of the water, in reference to the number of hours in the day that the water power was used by each. But that neither party had any right to complain that the other, by running his machinery in the night, obtained the use of water which would otherwise have flowed over the dam and been wasted; provided the water in the pond was not drawn down so as to impair its use during the ordinary hours of using it by the other party.

Where a party claims title to property under a recent conveyance from the defendant himself, he is not obliged to bring a suit at law, against the grantor, for disturbing him in his possession, in violation of the express provisions of his grant, before applying to the court of chancery for relief. It is only where the right of the complainant to the privilege claimed admits of doubt, that the court requires him to establish his right at law, previous to the granting of an injunction.

THIS was an application to dissolve an injunction, upon the matter of the bill only, or to modify the same in conformity to the rights of the parties. The bill was filed by an incorporated manufacturing company, to restrain the defendant from using the surplus waters of the Seneca river, on the south side of the upper level at Seneca Falls, to the injury of the company's mills. Previous to the 4th of June, 1844, the defendant was the owner of all the water power upon that side of the upper level; except the right of using sufficient water to propel two run of flouring millstones, which he had previously granted to D. W. Forman. On the last mentioned day the defendant sold and conveyed to the company, for the use of its mills and manufacturing establishment, a portion of his water power before mentioned, for the consideration of \$3,500. And the sub

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ject matter of the grant, and the extent of the right granted, was described in the conveyance thereof as follows: "All and singular the water power, water rights, and right to use the waters of the Seneca river, or outlet, for hydraulic purposes, particularly described as follows: being part of the water power and water rights belonging and appertaining to certain lands lying and being in the place aforesaid, on the south side of the Seneca river, conveyed by S. N. Bayard and wife to A. Bascom and A. P. Tillman, and subsequently conveyed, by G. V. S. and A. B. and their wives, to A. P. Tillman, by deed of partition dated 26th May, 1828; to which lands conveyed by the last mentioned deed there is now appurtenant the right of drawing, and using for hydraulic purposes, one half of the surplus waters of the Seneca river, or Cayuga and Seneca canal, belonging to the said party of the first part, except the right of drawing and using sufficient water to propel two run of flouring millstones, as conveyed to D. W. Forman, by said A. P. Tillman and wife. And the grant of water power and water rights, hereby intended, is the right of drawing, using, occupying, and enjoying forever, for hydraulic purposes, sufficient of the waters of the said Seneca river, or surplus waters of the said canal, so as aforesaid belonging to the party of the first part, to propel five run of millstones used for flouring wheat, with the necessary machinery attached thereto, by the most approved wheels, *to be drawn, used, and enjoyed, upon an equality of right with three other like run of millstones to be used by the said party of the first part, his heirs and assigns*; which said five run and three run of millstones shall have preference, in the use of the water above described, over the remaining rights now belonging to the said party of the first part." The conveyance from the defendant, to the company, also contained a grant of the privilege and right of entering upon his lands below the dam, and between the canal and the river, and to construct across such lands a culvert, and to convey the waters granted through such culvert, and to repair and reconstruct the culvert from time to time, as might be necessary. And it contained a general covenant on the part of the defendant, that he was the

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lawful owner of the premises, granted to the company, and had a good and perfect right to convey the right of using and discharging the water as therein granted. It also contained the usual general covenant of warranty. The company subsequently acquired the title to four-sixth parts of the privilege of using the water, for the two runs of stones, which had previously been granted by the defendant to D. W. Forman; and an inchoate right to the other two-sixth parts of that privilege, under a sheriff's sale thereof, but the time of redemption as to those two-sixths had not expired at the time of filing the bill in this cause. The bill, after setting out the deed of the defendant to the company, and the various conveyances under which they claimed the water power previously granted to Forman, alleged that at the time of the conveyance to the company, by the defendant, he was the owner of sufficient water power on the south side of the Seneca river, at that place, to propel at least five run of millstones, with the necessary machinery, at all times, and in all stages of the water. It also alleged that, by his deed the defendant intended to grant to the company a sufficient power to propel five runs of millstones; and that he alleged and pretended, before and at the time the deed was given, that he owned, and had, and held, sufficient water power to propel twenty runs of such millstones, and had a good right to convey the same; that at the time of the conveyance by him, to the company, his saw mill had but one saw, and required water power only for one saw, but that he had subsequently put in a second saw, and the necessary machinery attached thereto, whereby the said saw mill required double the quantity of water; that the defendant now used, for the said saw mill, water power sufficient to propel six or seven runs of millstones, and an additional power for the purpose of running a circular saw, &c. and that he also permitted the waters to leak through his flumes and run to waste; by means whereof the machinery of the complainant had not sufficient water to propel it, at times, for want of the water power to which the complainant was entitled, under the conveyance from the defendant, and under the prior grant to Forman.

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The bill claimed that the company was not only entitled to the exclusive use of four-sixths of the water power originally conveyed to Forman, but also to the exclusive right to water sufficient to propel five runs of flouring millstones and the necessary machinery, before the defendant was entitled to use any of the water power, when from the state of the stream there was not more water than was necessary to propel seven runs of stones. And the injunction which the defendant sought to have dissolved or modified, had been allowed upon that principle, and protected the rights of the complainant to that extent.

J. Maynard, for defendant. The complainants, in their bill, rest their whole case upon the construction which they put upon the defendant's deed. And the whole gravamen of the bill and the requirements of the injunction are based upon this construction. We insist this construction is erroneous. The deed does not grant five runs of water power in preference to the part retained by defendant, but only a five run power to be used upon an equality with three runs; these five and three runs, (equal to eight runs,) being entitled to preference over the residue owned by the defendant. The complainants' bill does not make a case entitling them to the relief prayed for, or to any relief whatever; 1. Because they claim an exclusive right, when their right is upon an equality with defendant. 2. Because the grant is conditional, to use the water in a certain manner; and it is not shown that it is used in that manner. The bill does not show that defendant is about to do any new thing, but only that he claims to enjoy a privilege which he always has enjoyed. Again; the complainants do not show themselves in the undisturbed possession, nor that a remedy at law would be unavailable; or that they would suffer any great or irreparable injury, without the interposition of this court. It does not appear by the bill, that defendant uses any greater portion of the river, or of the half of the river belonging to the south side, after deducting the amount claimed by complainants, than he owns; or that the one half of the river is insufficient to supply all that

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complainants and defendant both use, or wish to use. The injunction gives the complainants possession of what they never have had possession of before. It is, in this respect, an *ex parte* writ of execution, before judgment. The complainants do not show that the $1\frac{1}{2}$ run purchased from Bascom, Stout & Gallagher, is the same, or part of the same two runs, conveyed by defendant to Forman, or that Forman's title has passed over to complainant. In *Vandenburg v. Bergen*, (13 *John. R.* 212,) it is said by Platt, J. "The right in a stream is indivisible: a severance would destroy the rights of all."

D. Cady, for complainants. The bill alleges the use of water, by Tillman, in violation of complainants' rights, and of his deed. And it makes out a case of great and irreparable loss, continuing damage, &c., and shows an urgent necessity for an injunction. This is not a case where rights must be first settled by a suit at law. The questions do not arise under usage, or possession. They are the result of grants; and perhaps a question as to intention arises under the defendant's deed, which can only be settled in equity, in case, upon the face of the deed, our construction should be questioned.

The legal effect of the defendant's deed is this—it grants five runs, part and parcel of eight runs to be used in common with the three runs that make up the balance of the eight runs, subject to two runs that the grantor had before conveyed. The simple question is, suppose the grantor had not, at the time of the grant, the five runs and the three runs, but only a part thereof, on whom does the deficiency fall? We say the grantor. If there are not eight runs, five runs cannot run in common with three runs. The deed assumes there are eight runs, and professes to grant five of them. The construction of such a grant is of universal importance. A grantor conveys a part of a whole; the part granted exists, but the remainder of the whole does not exist. Is the grant destroyed or limited because the part not granted does not exist? Would not such a construction be absurd? Suppose A. grants to B. five eighths of one hundred acres of land, to be used in common with the re

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maining three eighths, and the grantor in fact only owns the five eighths. Will it be contended that the grantee will not take the five eighths? But to make the case still stronger—if A. sells to B. one run of water power, to be used in common with a like run owned by the grantor, and it should turn out the grantor owned but one run in all, would he sell half a run, or a whole one? But give the defendant the strongest construction he can ask, and the same consequences follow. Suppose he only grants five eighths of the power mentioned, then what does he grant? Why clearly five eighths of eight runs, which is five runs. But take the defendant's side of the case—on the assumption that there is not the two runs, and five runs, and three runs, he wants to limit his grant to less than five runs. How does he do it? He can only do it by saying that he granted such a part of what there was, to run in common with the remaining part of the whole. The defendant asks to have the qualification, in the use of the five runs with three runs, in case of deficiency of water, destroy the grant; so as, by construction, to bring into existence a right that the deed does not claim. And again, to destroy the grant, to give effect to what is not granted, to qualify the title sold by what is not sold—to say the five runs in common with three runs, means two runs in common with one run—to say if the grantor had not the right to sell five runs in common with three runs, the grantees shall suffer though he had the five runs that he did grant. The qualification, to give preference, where there is in fact the two runs and five runs and three runs, is good. For this purpose it is valuable, and for every other purpose it is void.

THE CHANCELLOR. Upon the hearing of this motion, I came to the conclusion that the counsel for the complainants, and the officer who allowed the injunction in this case, were under a mistake as to the extent of the right in the water power to which the corporation was entitled, under the deed of June, 1844. After a more full examination of the question, I see no cause to change the opinion I then expressed. It is true the bill charges that before, and at the time of, the execution of that

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deed, the defendant alleged and pretended that he had sufficient water power to propel twenty runs of stones. But that was a mere matter of opinion, as to the extent of the surplus waters of the river beyond what should be wanted, for the use of the state, and to propel two runs of millstones, under his previous grant to Forman. And the officers and agents of the company must be presumed to have had the same means that he had of forming a correct opinion upon that subject. For it is not alleged, or pretended, that he concealed any matter of fact, within his knowledge, which was necessary to enable them to form a correct judgment as to the probable extent of the surplus water power, after supplying the state canal. From the very nature of the case, the extent of the water power belonging to the defendant, which both parties knew was one half of all the surplus waters of the upper level, except that previously granted to Forman, specified in the complainants' deed, was a matter of mere conjecture or calculation. The officers or agents of the company, therefore, instead of relying upon the defendant's estimate of the probable amount of surplus water which the river would afford, for the future, should have made their own calculations upon data which it was equally within the power of both parties to obtain. And if they were not convinced that there would be at all times water enough to propel at least eight runs of millstones, after satisfying the previous grant of water power to Forman, they should have contracted with the defendant for the exclusive right to so much of the surplus water, belonging to him, as would at all times be sufficient to propel five runs of flouring millstones, with the necessary machinery. It is indeed stated, in the bill, that the defendant, by his deed, intended to grant to the company a sufficient power to propel five runs of millstones. But it is not alleged that he intended to grant an exclusive power to that extent, or any exclusive power whatever, or that either party supposed the agents of the company were contracting for such an exclusive power. On the contrary, the deed shows that both parties intended that the power for five runs of stones, granted to the company, should not be used to the exclusion of all right to the use of the water, by the defe

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when there was only sufficient to propel five runs after satisfying the previous grant to Forman. For it appears by the deed itself, as well as by the complainants' bill, that at the time of the execution of that deed, the defendant had a saw mill which was supplied with water power from the surplus water then belonging to him. And the grant of water power for five runs of stones, to the company, expressly declares that the water power, thus granted, is to be drawn, used, and enjoyed, *upon an equality of right* with three other like runs of millstones, to be used by the defendant and his heirs and assigns. The only exclusive right, secured by the deed, is that the five run power granted to the company, and the three run power reserved to the defendant and his assigns, to be used upon an equality of right therewith, are to have preference in the use of the water, over the remaining water power belonging to the defendant, beyond the eight run power. There is no pretence that there was any mistake in drawing the deed, or that it was not made in conformity with the bargain actually made by the parties. And it is hardly possible to use language more clear and explicit, to show the intention of the parties that the grantees were not to have the exclusive use of the water, to the extent of a five run power, in case of a deficiency of water to propel eight runs, but that the defendant should have an equality of right, in reference to the three run power reserved to himself. I am bound to presume, therefore, notwithstanding the allegations in the bill, as to the intention and representations of the defendant, that at the time of the execution of this deed, both parties contemplated that, by reason of drought or otherwise, the surplus waters on that side of the upper level might not be sufficient to propel the whole of an eight run power of machinery, beyond the amount required to satisfy the previous grant to Forman; and that the clause in question, in this deed, was inserted by them for the express purpose of restricting the grant to the complainants in the event contemplated, so as to give to the defendant a right to participate in the water power, notwithstanding the grant of the five run power to the company.

The rights of the parties, therefore, under that deed and the

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previous grant to Forman, are as follows. The two run power, previously granted to Forman, must be first satisfied. And so far as the company has acquired that water power, its right to use it is exclusive of the defendant. While the complainants therefore, or the owner of the other two sixths thereof, are in the use of that two run power, the defendant is not at liberty to use the water, or to suffer it to run to waste, so as in any way to interfere with, or impair, that right. After supplying that two run power, or so much thereof as the parties now owning it wish to use, according to their several rights therein, if there is not sufficient water on that side of the river, at the upper level, to propel eight runs of millstones, exclusive of the half of the surplus waters, or so much of that half as is actually used on the north side, the complainants and defendant are entitled to participate in such water equally, in the proportion of five parts to the former, and three parts to the latter. And in the estimate of the water power used by each, there must be included so much of the surplus water as is suffered to run to waste, by the negligence of the parties, respectively, or by their suffering the flumes, or other works which they are severally bound to repair, to be out of order.

Such being the rights of the parties, the bill shows that the defendant, at the time of the granting of the injunction, was using the surplus waters of the Seneca river, at the place in question, in a manner which was wholly inconsistent with the grant to the complainants, and the rights which such complainants had acquired under the previous grant from the defendant to Forman; and so as in a great measure to destroy the whole value of the use of the company's property. For the bill distinctly charges, that the water power derived under the grant to Forman, and the grant of the five run power, directly from the defendant to the company, is all that is necessary to propel the whole of its machinery, and is more than sufficient for that purpose. It also charges that the defendant uses, for his saw mill, a water power sufficient to propel from seven to eight runs of flouring millstones, with their machinery, exclusive of the water which he suffers to run to waste by leakages in his flumes,

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gates, and other structures; and that he runs his saw mill, a great part of the time, both night and day. And the bill further states, that by this use and waste of the water, by the defendant, there is not sufficient water power left to the company to propel six and one-third run of stones; but on the contrary, for a large part of the time in dry seasons of the year, and in all seasons of drought, by such use and waste of the water, by the defendant, there is no water power left for the propelling of the machinery of the company, and at other times very little is left for that purpose, so that such machinery is frequently obliged to stand still for want of water. If these allegations in the bill are true, the defendant is guilty of a clear and substantial infringement of the rights of the complainants. For, in no event has the defendant the right to use more than a proportional part of a three run water power until the machinery of the company is fully supplied to the extent of a six and one-third run power. Nor has he the right, by running his saw mill in the night time, in dry seasons, so to draw down the surplus waters of the upper level as not to leave for the company its proper proportion of the water, in reference to the number of hours in the day that the water power is used by each. But neither party has any right to complain that the other, by running his machinery in the night, obtains the use of water which would otherwise have flowed over the dam and been wasted; provided the water in the pond is not thereby drawn down so as to impair its use during the ordinary hours of labor of the other party.

The objection of the defendant, that the complainants are not stated to be in the enjoyment of the right claimed, and that such right has not been established in a suit at law, is not well taken. Here the complainants claim under a recent conveyance from the defendant himself; and if the machinery of the company was now for the first time ready to be put in operation, by the use of the water power granted for that purpose by the defendant, there is no principle upon which the complainants should be required to bring a suit at law, for diverting the water, in violation of the express provisions of the grant, before applying to this court for relief. It is only where the right of the com-

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plainant to the privilege claimed admits of doubt, that the court requires him to establish his right at law previous to the granting of an injunction. Here is no fact to be tried at law, to establish the right of the company to a participation in the use of the waters in question, in conformity with the terms of the grant from the defendant, except the simple fact of the due execution of the deed ; as to which fact there is no question raised.

Nor is the objection valid, that the grant of the use of the water was upon condition that it should be used in a particular manner, and that it does not appear it is so used by the complainant. The conveyance does indeed recite, that the grantees intend to draw and use the water power upon lands which do not belong to the grantor, and to discharge the same into the river under the canal, at a particular point below the dam. But that particular manner of using the water power granted is not made a condition of the grant. And this recital appears only to have been introduced in connection with the further grant of the right to enter upon the lands of the grantor, and construct and keep in repair a culvert thereon for the discharge of the waters into the river, after they shall have been used by the grantees. If the company, therefore, can use the water power granted, and discharge the waste water into the river at any other place, without crossing the lands of the defendant, or interfering with the rights of the public or of individuals, I see nothing in the terms of this conveyance to prevent the complainants from using the water power granted in that manner. The expression in the deed, that the water power intended by the grant is the right of drawing, using and occupying, and enjoying forever, for hydraulic purposes, sufficient of the waters belonging to the defendant to propel five runs of mill stones used for flouring wheat, with the necessary machinery, by the most approved wheels, evidently refers to the measure or mode of estimating the amount of water power granted. And it does not require, as a condition of the grant, that such water power shall be actually used and applied to the propelling of the stones and machinery of a flouring mill, and by a particular kind of wheels. The grantor undoubtedly

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knew the water power purchased of him was intended to be used, not in a flouring mill, but in a manufactory of woollen goods; as the name of the corporation, to which the conveyance was made, indicated. But as the quantity of water necessary to propel a run of stones, in a flouring mill, with the necessary machinery, with a given head of water, was a matter of easy calculation, that specification was resorted to, by the parties, as the most certain and definite measure of the water power intended to be granted to this woollen manufacturing corporation. It may also be observed, that the same or similar language is used in this deed, to measure the quantity of water power which the defendant reserved the right to use in common, or in equality of right, with the water power granted to the company; though the water power thus reserved to himself was unquestionably intended, for the present at least, to be used for the purpose of propelling the machinery of his saw mill.

The injunction was therefore proper, so far as it restrained the defendant from using the water power, or suffering it to run to waste, to the prejudice of the complainants' rights as before declared. And to that extent the injunction must be retained until the coming in of the answer. But the injunction, as granted, was much too broad. It must, therefore, be modified, if that has not already been done pursuant to the directions given at the close of the argument, so as to leave the defendant in the full enjoyment of his rateable proportion of the water power as above declared.

And neither party is to have costs as against the other, upon this application.

In the matter of the petition of MARGARET JONES.

It is not the practice of the court of chancery, to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances; nor for the mere purpose of increasing the income of an adult owner of a present interest in the estate.

THIS was a petition, by the mother of certain infants, praying that she might be appointed their special guardian, for the purpose of selling their real estate. The father of the infants, by his will, devised his real and personal estate to the petitioner, his wife, for life; and directed her, out of the avails thereof, to support and educate their children. And, after her death, the property was devised and bequeathed to the children, in equal proportions. The petition stated that the infants had no other property, real or personal, and that a sale of the real estate was necessary for their support; the income of the property bequeathed being insufficient for that purpose.

O. L. Barbour, for petitioner.

The CHANCELLOR said, it was not the practice of the court to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances; nor was it ever done for the mere purpose of increasing the income of the adult owner of a present interest in the estate. That, in this case, the testator evidently intended that his children should be supported out of the income of the real and personal estate devised to his wife, and that the capital should be reserved until her death; that it would, therefore, be contrary to the spirit of the will, to allow their interests in the land to be sold for their present support, leaving the mother to enjoy the whole income, for life, for her own use, after they should be old enough to earn their living. Neither would it be equal as between the children themselves; as one of them was nearly old enough to earn his living, and would be quite so, long before the youngest would reach a sufficient age to enable her to support herself.

Application denied.

RADCLIFF and others vs. ROWLEY and others.

[Approved, 8 Fed. Rep. 776.]

The sale of real estate, by a sheriff, upon an execution against the nominal owner thereof, conveys an apparent legal title to the purchaser, which can only be displaced by the evidence of witnesses, whose testimony may soon be lost by lapse of time. A person, therefore, claiming to be the owner of real estate, which has been thus sold under an execution, upon a judgment improperly obtained, may come into a court of equity for the purpose of obtaining a decree to quiet his title to the premises, and to remove the cloud therefrom.

In a bill for relief on the ground of fraud, it is not necessary that the complainant should allege that he has discovered the fraud complained of, within six years. And a demurrer will not lie to such a bill, although it appears that the fraud occurred more than six years before the commencement of the suit, unless it also appears, at least by necessary intendment, that the fraud was discovered, by the party aggrieved, more than six years before he filed his bill for relief. Where that does not appear, the defendant must be left to make his defence by plea, or answer, so as to present an affirmative issue, upon the question as to the discovery of the fraud by the complainant.

Upon a general demurrer to a bill, for relief upon the ground of fraud, it is not necessary to inquire whether some grounds of relief stated in the bill do not appear, upon the face thereof, to be barred by lapse of time. If that question is sought to be raised, on demurrer, it must be done by a separate demurrer to those particular part of the bill.

THIS was an appeal, by the defendant Rowley, from a decretal order of the vice chancellor of the first circuit, overruling a demurrer to the bill of the complainants.

In 1812, W. Radcliff purchased of G. Van Benthuyzen a lot of land in Otsego county, and received from him a conveyance in fee, with warranty. Radcliff gave back a mortgage, on the west 260 acres of the lot, to secure a part of the purchase money. That mortgage was afterwards foreclosed, and the mortgaged premises were bid in by the defendant Rowley, in January, 1821, but as the bill alleged, for the benefit of Van Benthuyzen. At the time of the first mentioned sale to Radcliff, in 1812, there were two outstanding judgments against Van Benthuyzen, which were liens upon the whole premises. And the bill alleged, that after the mortgaged premises had been conveyed to Rowley under the statute foreclosure, for the benefit of Van Benthuyzen, Rowley paid the amount of the judg-

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ments, to the owner thereof, with the funds of Van Benthuyssen which he then had in his hands as the agent of the latter ; and that, with the intention of defrauding both Radcliff and Van Benthuyssen, the defendant Rowley took an assignment of the judgments, in his own name, and caused the part of the lot not covered by the mortgage to be sold under executions upon the judgments, and became the purchaser thereof for his own benefit, in April, 1821. The bill also charged, that Rowley caused that part of the lot to be sold, on the executions, without any notice to Radcliff of the existence of the judgments, or of the proceedings thereon, and intentionally concealed a knowledge of the facts from him ; and for that purpose that he issued the executions irregularly, without having revived the judgments by scire facias ; that, at the time of the issuing of such executions, Van Benthuyssen was the owner of valuable real estate in the counties of Warren and Essex, and also in the county of Dutchess, where he resided, upon which estate the judgments were then liens, and which lands should have been first sold to satisfy the judgments, if any thing was due thereon as against Van Benthuyssen. The bill also stated the commencement of a suit in the court of chancery by Van Benthuyssen against Rowley, in 1831, for an account ; charging the defendant in such suit with various frauds, and claiming, among other things, the land purchased in by Rowley on the before mentioned executions ; that a decree was made in that suit, in November 1834, deciding that Van Benthuyssen was the beneficial owner of the land so purchased in, and that Rowley only held the title as trustee for him, and directing Rowley to convey to him under the direction of a master, and that the same was so conveyed in January, 1839 ; but that under an order made in that cause, subsequent to the decree, and before the deed had been given, an endorsement was made upon the deed, by the master, stating that the land thereby conveyed was subject to a lien, in favor of Rowley, for such balance as might be found due to him under the decree in that suit. Radcliff died in possession of the premises in controversy, in July, 1842, and the complainants in this suit, as his heirs, then went into possession thereof, and were in such

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possession at the time of filing their bill in this cause, in September, 1844. A final decree was made in the suit of Van Benthuyssen against Rowley, in November, 1840, by virtue of which the latter claims a lien upon the premises in question for the balance decreed in his favor. Van Benthuyssen died in March, 1841, and the suit was revived, by Rowley, against his representatives and heirs. And the defendant Rowley, at the time of the commencement of this suit, was proceeding to have the premises which were so purchased in by him, on his executions, sold, under the decree in his favor against Van Benthuyssen. The other defendants were the mortgagees of the premises, claiming under Rowley, and as the bill alleged were not bona fide mortgagees without notice of the complainants' rights.

The complainants prayed that they might be quieted in their title to the premises in controversy, against the claims of the defendants, and that the defendants might be decreed to relinquish their pretended liens upon the premises, under the decree against Van Benthuyssen and the mortgage of Rowley, or for such relief as the complainants were entitled to upon the case made by their bill. The defendant Rowley demurred to the whole bill for want of equity. He also stated, as a special ground of demurrer, that the causes of complaint stated in the bill arose more than ten years before the commencement of this suit, and that the acts of fraud, charged in the bill, were known to Radcliff, the ancestor of the complainants, in his lifetime, and were discovered by him more than six years before his death, and before the filing of the bill in this cause.

The following opinion was delivered by the vice chancellor :

W. T. McCOUN, V. C. There are two principal grounds of demurrer in this case : 1. Want of equity in the bill. 2. That the relief is barred by the statute of limitations ; more than six years having elapsed, since knowledge of the facts.

The bill tells the story of a series of frauds practised by Rowley upon his client and principal, Van Benthuyssen, and upon the complainants' ancestor, William Radcliff. But it

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claims relief only in respect to that portion of the lands which was sold under the executions, upon the Banyer judgments, in April, 1821. The other portion, sold under the mortgage in January, 1821, it does not attempt to reclaim; and if it did, the statute of limitations would be a bar. So with respect to the 260 acres sold under the executions, if by that proceeding the complainants or their ancestor had been dispossessed of the land, and the object of this bill was to set aside the sale, and to be restored to the possession and ownership of the land, there would seem to be no necessity for coming into this court, or at this late day the claim to such relief would be barred by the statute.

But the bill shows that notwithstanding the sheriff's sale, and the failure to redeem in 1822, the ancestor of the complainants remained in the undisturbed possession, down to the time of his death, in July, 1842. In the mean time a litigation took place between Rowley and Van Benthuyzen; and as between them, the latter was adjudged to be the owner, subject to the lien or charge of the former, for the balance of his account. And subject to that charge, Rowley conveyed to Van Benthuyzen on the 17th January, 1839. Thus Van Benthuyzen became vested with the legal title, and as between him and Radcliff, an equity arose, that the latter should be protected against that legal title, by reason of Van Benthuyzen's covenants and warranty, in his original deed to Radcliff.

It then appears, that since the death of Radcliff, his heirs, the complainants, have remained in the undisturbed possession of the land, and that Rowley has obtained a decree for the balance due to him from Van Benthuyzen. This decree was made on the 24th of November, 1840, and was enrolled on the 14th of September, 1842. Van Benthuyzen died on the 14th of March, 1841, and Rowley is proceeding to a sale of the land under that decree, which sale is advertised for the 17th of September, 1844. This proceeding of Rowley, and the sale he has advertised, operate to the prejudice of the title of the complainants, and to their possession and the use and enjoyment of the property—and they therefore claim to be protected in that

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possession and enjoyment, as against Rowley, and also against his mortgagees, the Messrs. Crafts.

The bill appears to me to show a strong case for that purpose, as against these parties. A case, too, of which chancery has jurisdiction, on the ground of removing clouds from the title of the complainants, and obstacles in the way of their full enjoyment of the property; which is an acknowledged head of equity. (*See Mayor, &c. of Brooklyn v. Meserole*, 26 *Wend.* 137. *Van Doren v. Mayor of New-York*, 9 *Paige*, 389, 390.)

I am of opinion, also, that this case for equitable relief may well be considered as having arisen when Rowley undertook, or threatened, to enforce the decree, for his balance, against the land in question; or that an equity arose to Radcliff, to have the land exonerated from all claim of Van Benthuyzen, and of Rowley as his creditor, the moment Rowley conveyed it to Van Benthuyzen, by his deed of the 17th of January, 1839. This was within six years of the time of filing the bill.

The demurrer must, therefore, be overruled, with costs.

B. F. Butler, for appellant. There is no equity in the bill, to entitle the complainants to the relief sought by it.

If there be any such equity, it is barred by the statute of limitations, for the reasons set forth in the demurrer.

A. H. Dana & A. C. Bradley, for respondents. As to the lapse of time, which is assigned for cause of demurrer. Limitation of time by statute is not a bar to the jurisdiction of the court; but is only a defence which may be set up in pleading, or otherwise. It cannot be insisted upon for the first time at the hearing. It is not like the case of a specified amount that the court will alone take jurisdiction of; where if it appear at the hearing that the amount in controversy is below that sum, the bill will be dismissed. This defence should properly be made by plea or answer. A demurrer raises only such objections as would be ground for dismissing the bill, at the hearing, for inherent defect. (*Mitf.* 272. *Prince v. Heylin*, 1 *Aikin*, 494.) This demurrer rests mainly upon the limitation of six years,

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for applying for relief from fraud ; but the case made by the bill does not show that the limitation applies. Although it states transactions of more than six years since, it does not show that the complainants have had knowledge of them six years. This is necessary to be stated. (2 R. S. 229, 2d ed.) The limitation in this case is not like that prescribed as to actions at law. A plea that six years have elapsed, would not be good ; it must be averred that the six years have elapsed since the parties had knowledge of the facts. Nothing is to be implied, beyond the express statements in the bill. And it is not stated that six years have elapsed since the complainants had knowledge of the facts. A case is not therefore stated that comes within the statute. (See *Story's, Eq. Pl.* 448. 4 *Paige*, 374.) It is not necessary, as in the case of the lapse of twenty years, to avoid the effect of it, by an averment showing an exception ; for in that case it is presumed to be an absolute bar, unless there was some disability ; which is to be shown. And even ignorance of the facts is no answer. (*Humbert v. Trinity Church*, 24 *Wend.* 587.) Nothing need be averred but what is susceptible of proof. An averment that complainants had not knowledge could not be proved, if any issue should be made upon it by the answer. The proper issue would be upon an affirmative averment by defendant, that the complainants had knowledge. Such an averment, in this bill, would have been objectionable upon another ground, as requiring proof that another person from whom the defendants derived their right had not knowledge. The bill is not for relief against the original acts of fraud alleged to have been committed by defendant, taken by themselves. The possession of complainants is sufficient against any claim of right claimed therefrom. But the defendants claim now upon a new ground ; viz. a decree of this court, made in 1840. It is not attempted to impeach that decree ; but as complainants were not parties thereto, and not bound thereby, they seek to show that the attempt made by defendants, under color of that decree, is fraudulent as against them. The matters set up by the bill would be a defence to an action of ejectment, if it should be brought by defendants for recovery of possession.

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But such a suit may not be brought ; and the existence of the claim impairs the title. The transaction as to the mortgage, is of later date. The mortgage appears to have been given in 1831. The evidence of it was recently furnished to complainants. The lapse of time since the mortgage was given is not the question. The mortgage was dormant, as no claim was made under it. It became material only when the new claim was set up by Rowley. The transactions involved may be considered as continuous, from 1821, when the sale took place under the judgment, till the present time, when a new sale is attempted under a decree in the suit with Van Benthuyzen. And the complainants are in time if they have proceeded within six years from consummation.

As to the other grounds of demurrer. This bill may be regarded in the nature of a bill of interpleader, or a proceeding supplemental to the suit between Van Benthuyzen and Rowley. There is no impeachment of the decree. The rights of other parties are to be considered. The decree is valid as between the parties to that suit ; but it may be inoperative as to others. The real question is, whether the decree of the court settling that Van Benthuyzen, and not Rowley, was the owner of the land in question, has not now put an end to the original controversy, and whether defendant is not now limited to a lien upon whatever right Van Benthuyzen had, which these complainants say was none at all against his own conveyance with warranty. There may be surplusage in the bill in respect to former proceedings, but that should be the subject of exceptions for impertinence. The mere statement of frauds long since committed, is no objection to a claim for relief against a new attempt to carry them into execution. The demurrer cannot be sustained in part only. And being clearly not well taken as to some portions of the bill, it should be overruled.

THE CHANCELLOR. If the bill intended to charge in this case, that nothing was due upon the mortgage at the time of the sale under the statute foreclosure, and that charge was true, the sale was a nullity ; and the ancestor of the complain-

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ant had a perfect defence at law to an action to turn him out of possession. And after such a lapse of time it is too late to seek relief in any court. If any thing was due upon the mortgage, the foreclosure was regularly made, and cannot be disturbed upon the ground that the appellant represented to the bidders that he was about to bid it in for the benefit of the mortgagee; which representation, as I infer from the bill, was true at the time it was made. If so, there was no fraud in the purchase; but the fraud, if any, was a subsequent fraud, upon Van Benthuyzen, in withholding the property from him. For the foreclosure being regular, and no false representation having been made to prevent competition, Van Benthuyzen was entitled to the mortgaged premises at the price for which they were struck off to his agent or trustee.

This part of the bill, however, may be material for another purpose, and I presume that was the object for which these charges were inserted in the bill. The appellant subsequently caused the other half of the lot, which had been conveyed to Radcliff with warranty, to be sold under the executions against Van Benthuyzen, whose property was primarily liable for the payment of the judgments. And if Van Benthuyzen was then the beneficial owner of the mortgaged premises, under the statute foreclosure, those premises should have been first sold under the executions. Rowley, who knew the fact, was guilty of great injustice in causing the other half of the lot, which was only secondarily liable, to be sold first and to be bid in for his benefit; even if the judgments belonged to himself, and had been purchased on his own account and paid for with his own funds. But if, as the bill charges, the judgments had been paid for with the funds of the judgment debtor, in the hands of Rowley as his agent, then the judgments, though nominally assigned to him, were in fact paid and satisfied. And causing the lands of Radcliff to be sold upon the executions issued on those judgments, under the circumstances stated in this bill, either with or without the consent of Van Benthuyzen, was a gross and palpable fraud; against which a court of chancery ought to relieve the complainants, if their remedy is not barred

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by lapse of time. It is therefore unnecessary, for the present, to consider what new rights, if any, Radcliff acquired under the decree of May, 1834, in a suit to which he was not a party; or under the conveyance to Van Benthuyzen in pursuance of that decree, and of the order of the 8th of January, 1839.

If the allegations in this bill are true, I am inclined to think Rowley did not obtain the legal title to the premises in question by virtue of the sheriff's sale. If so, the complainants, who are in possession, can successfully defend themselves in any suit at law which may be brought against them to disturb that possession, even as against the mortgagees of Rowley, or against a purchaser under the decree in his favor against Van Benthuyzen. But upon that question I do not intend to express a definitive opinion at this time. For if they had a good defence at law, they had also a right to come into equity for relief, to remove the cloud upon their title, caused by the alleged fraud of the appellant. The judgments and executions and the sale by the sheriff give an apparent legal title to the purchaser, and to those who are claiming under him as subsequent mortgagees, which apparent title can only be displaced by the evidence of witnesses; and that evidence may soon be lost by lapse of time. It is therefore a proper case to come to a court of equity with, for the purpose of obtaining a decree to quiet their title to the premises, and to remove this cloud therefrom. (*See Pettit v. Shepherd*, 5 Paige, 501, and the cases there referred to.)

Is the complainant's claim to relief then barred by lapse of time? This, it will be seen, was not a case of concurrent jurisdiction, in which the right to relief in this court would be barred in analogy to the time allowed for bringing a suit at law. For Radcliff being in possession, at the expiration of the fifteen months after the sheriff's sale, he could not institute a suit at law to try this question of fraud. His only remedy at the time was to file a bill in equity to set aside the sheriff's sale, and thus to remove this cloud, which the appellant's fraud had cast upon his title. One claim to relief is founded upon the alleged fraud, in obtaining an apparently good paper title to the

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premises in question, under the forms of law, after Rowley knew the judgments had been paid with the funds of the judgment debtor. It is a case, therefore, so far as the complainants seek relief by removing that cloud from their title, in which the suit must be brought in this court within six years after the discovery, by the aggrieved party, of the facts constituting the substance of the alleged fraud. (2 R. S. 301, § 51.) But it does not appear, on the face of this bill, when W. Radcliff discovered the alleged fraud, or that he ever did discover the fact, now stated by his heirs, that the judgments had been paid by Rowley, as the agent of the judgment debtor, with funds in his hands belonging to the latter, before the sheriff's sale. The bill shows that Radcliff knew of the sheriff's sale within a year or two after it occurred, and that he discovered something, or supposed he had, which induced him to file a bill in this court against Rowley and Van Benthuyzen jointly. But it does not appear that it was for the same fraud now complained of. And I think upon a proper construction of the statute, it is not necessary that the complainant should allege in his bill that he has discovered the fraud, complained of, within six years. A demurrer, therefore, will not lie, to a bill for relief on the ground of fraud, although it appears that the fraud occurred more than six years before the commencement of the suit; unless it also appears positively, or by necessary intendment, that the fraud was discovered, by the party aggrieved, more than six years before he filed his bill for relief. Where that does not appear, the defendant must be left to make his defence by plea or answer, so as to present an affirmative issue upon the question of the discovery of the fraud.

This is sufficient to dispose of this case, upon a general demurrer to the whole bill. It is not necessary, therefore, to examine the question whether there are not some grounds for relief, of a recent date, stated in this bill, which could not have been barred, under any provision of the article of the revised statutes relative to the time of commencing suits in courts of equity. Nor is it necessary to inquire whether some of the grounds of relief, stated in this bill, do not appear upon the face of the

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bill to be barred by lapse of time. If that question is sought to be raised, on demurrer, it must be done by a separate demurrer to those particular parts of the bill.

The decretal order appealed from must be affirmed with costs.

ROOT vs. SAFFORD and others.

It is no objection to a motion for a receiver, and to an order for the examination of the defendant on oath before the master, in a creditor's suit, that an answer upon the oath of the defendant is waived, by the bill.

THIS was a creditor's suit. *E. L. Fancher*, for the complainant, applied for an order of reference, to a master, to appoint a receiver, and for the examination of the defendant on oath, before the master, in the usual manner.

A. C. Bradley, for the defendants, resisted the application, on the ground that, by the bill of complaint, an answer upon the oath of the defendant was waived.

The CHANCELLOR decided that the waiver of an answer from the defendant on oath constituted no objection to the appointment of a receiver, or to the making of an order for the examination of the defendant on oath before the master, on the reference, with respect to the property to be assigned to the receiver, &c.

Order accordingly.

McGEOCH and others *vs.* BULLIONS and others.

Where an appeal calls in question the principles upon which an account is directed to be taken by the decree appealed from, as well as the liability of the appellants to account at all, the court of chancery will not allow such account to be taken before the appeal is disposed of; without, at least, requiring the respondents to stipulate to pay all the expenses of taking such account, in case the decree shall be reversed, or modified in any respect, so as to require the account to be taken anew.

THIS was an application, by the complainants, for leave to proceed with a reference, ordered by the vice chancellor, pending an appeal brought by the defendants.

M. Fairchild, for the complainants.

C. I. Allen, for the defendants.

THE CHANCELLOR. In the case of an appeal from a decree directing the taking of an account, or directing a reference to compute the amount due upon a mortgage, where the principles upon which the account is to be taken, or the computation is to be made, are not the subject of contest, upon an appeal from a vice chancellor, it might be proper for this court to allow the account to be taken, or the reference to be proceeded in pending the appeal, at the risk and expense of the respondent. Whether it can be done, however, in the case of a final decree, under the 116th rule of this court, is a matter of some doubt. But where the appeal calls in question the principles upon which the account is to be taken, against the appellants, as well as the fact of their liability to account at all, it might be productive of unnecessary expense to allow the account to be taken until the appeal was disposed of here. At least it would be unreasonable to allow it, in this case, without requiring the respondents to stipulate to pay the appellants all the expense to which they may be subjected, in taking the account, if the decree should be reversed, or be modified in any respect, so as to require the account to be taken anew.

Matter of Ingraham.

I am therefore of opinion that it will be better for both parties that the taking this account should be suspended, until the principles upon which the account is to be taken, as well as the right to the account itself, shall be finally settled, upon the appeal.

The application must therefore be denied.

Matter of the petition of SILAS INGRAHAM.

The court of chancery has no jurisdiction, upon the petition of a stranger to a suit in that court, to order a demand which he has against a firm in which the defendants in such suit are partners, to be paid to him, out of funds in the hands of the receiver in the suit.

The remedy of a person having an equitable claim to funds thus situated is to file a bill, making the complainants in such suit, and the several members of the firm, defendants, after having exhausted his remedy at law, against his debtors by judgment and execution.

THIS was an application by S. Ingraham, a stranger to the suit brought in this court by H. G. Harrison against Jonas Ingraham and Daniel Bolles, to have a demand which he had against a firm in which the defendants were partners, paid to him out of their funds, in the hands of the receiver.

J. Wilkinson, for the petitioner.

N. K. Hall, for H. G. Harrison.

THE CHANCELLOR. There is nothing in the petition which gives to this court any jurisdiction, or authority to interfere in this summary way, even if the petitioner has a preferable claim on the funds in question. If he has any equitable claim to payment out of any funds which belonged to either of the firms, and which claims are affected by the decree in this suit, which is doubtful, at least, upon the facts stated in his petition, his proper course is to file a bill, in his own name, making Harrison, and the several members of the firm, defendants in such suit. 1

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am inclined to think, however, that he is not in a situation to file such a bill until he has exhausted his remedy at law, against his debtors, by judgment and execution.

Application denied, with costs.

CLARK *vs.* DAKIN and others.

The returning of an execution, issued on a judgment in the supreme court, to the wrong clerk's office, *it seems* is a mere error of form, which even that court would not notice, upon an application to set aside the return for irregularity.

But if such a return is irregular, application must be made to the supreme court to set aside the return. The irregularity cannot be insisted upon, in the court of chancery, as a ground for resisting an application for a receiver, upon a creditor's bill founded on the judgment at law.

It is not necessary to docket a judgment of the supreme court, to enable the plaintiff to sell the defendant's interest in lands, upon an execution.

The defendant in a creditor's suit, cannot object that the complainant has not exhausted his remedy against lands which had been sold, or pledged to others, before the execution upon the judgment at law was issued.

A judgment recovered previous to the passage of the law requiring judgments in the supreme court to be docketed in the several counties, is a lien upon all the lands of the defendant in any of the counties of the state, without being docketed in each county.

The revival of a judgment, by *scire facias*, does not render a second docketing of such judgment necessary, so far as respects the original debt and costs.

THIS was an application, by the complainant, for the appointment of a receiver upon a creditor's bill, as against the defendants Dakin and W. W. Mumford, the judgment debtors.

O. L. Barbour, for the motion.

W. W. Mumford, for the defendants

THE CHANCELLOR. Several technical objections were taken to this application, by the defendant W. W. Mumford, which it may be proper briefly to notice. The first is, that the execution, which was issued to the county of Monroe, was returned

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to the clerk's office in Utica, instead of the clerk's office at Geneva. I am inclined to think this is a mere matter of form, which even the supreme court would not notice, upon an application to set aside the return for irregularity. But if it is irregular, the application must be made there, to set aside the return. For the remedy at law is exhausted, by the sheriff's return upon the execution, which is all that is necessary to give this court jurisdiction to proceed.

The next objection is, that the judgment has not been docketed in the county of Monroe, where the defendant Mumford resides. The short answer to this objection is, that this court has frequently decided that it is not necessary to docket a judgment of the supreme court, to enable the plaintiff to sell the defendant's interest in lands.^(a) The object of docketing the judgment is merely to obtain a lien upon the lands as against purchasers and subsequent mortgagees, or judgment creditors. And the defendant in a creditor's bill cannot object that the plaintiff has not exhausted his remedy against lands which had been sold or pledged to others, before the execution issued. (10 *Paige's Rep.* 325.) Again; the judgment in this case was recovered in 1839, before the passage of the law allowing or requiring judgments in the supreme court to be docketed in the several counties. It was therefore a lien upon all lands of the defendants in any of the counties of the state; and the revival of the judgment by scire facias did not render a second docketing necessary, so far as respects the original debt and costs.

The objection that the judgment was purchased for the purpose of bringing a suit upon it, rests only upon the suspicion of the defendant, and therefore cannot avail him, without some proof of the fact. And the same may be said in relation to the objection that the complainant is not a bona fide assignee of the judgment, but holds it as a mere trustee for the original judgment creditor. The defendant does not pretend to know the fact alleged, but merely states it as his belief. But that alone is not sufficient, to justify the court in presuming that the

(a) See *Youngs v. Morrison*, (10 *Paige*, 325.) *Corey v. Cornelius*, (1 *Barb. Ch. Rep.* 571.)

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alleged assignment of the judgment was fraudulent and collusive. And such assignment having been made before the filing of Mumford's bill against Sprague, the decree in that suit, even if it still remained in full force and effect, could not be a bar to the present suit.

But the assignee of the judgment took it subject to the equity of any of the defendants therein, to be released from all responsibility thereon. And the matters stated in the bill of *Mumford v. Sprague*, which are verified by the oath of the defendant, W. W. Mumford, in that suit, will, if set up as an answer to this creditor's bill, and supported by proof, probably constitute an equitable defence to the bill of the present complainant, who sits in the seat of his assignor. There seems, therefore, to be a good reason, upon that ground alone, for refusing to appoint a receiver as to the property and effects of W. W. Mumford, in this stage of the suit, unless it should appear that some of his property or effects are in such a situation as to require the immediate interposition of the court, to prevent a loss to both parties, before the case can be decided upon its merits. The injunction, if one has been granted, will in the meantime, prevent the defendant Mumford from wasting or squandering his property. The application for the appointment of a receiver, as to him, must therefore, for the present, be denied, and the costs are to abide the event of the suit. But it must be denied without prejudice to the right to renew the application, upon papers presenting a case rendering the interposition of the court necessary or proper.

The receivership, as to the defendant Dakin, who makes no defence, may be granted; and the reference is to be to a master in the county where Dakin resides.

In the matter of the petition of LEEFE and wife.

THE constitution having given to parties an appeal to the chancellor from all inferior equity tribunals, and the legislature not having made any provision authorizing any other person to sit for him in a case where he is related to one of the parties, the chancellor is bound to hear an appeal, even where a near relative is personally interested therein.

The provision of the statute, prohibiting any judge from sitting, where he is related to either of the parties, is controlled by the constitution, as the paramount law.

THIS was a submission, by the parties, in the nature of an application to dismiss an appeal upon the ground that the chancellor had not jurisdiction to hear it. A petition was originally presented to the chancellor, not only asking directions that the late assistant register should transfer, to the petitioners, property which he held in his official character, but asking further relief against the assistant register personally. Under those circumstances, the chancellor deemed it proper, on account of relationship, to refer the petition to the vice chancellor of the first circuit, to hear and decide the same. The vice chancellor made a decree affecting the assistant register; in his official character only; from which decree the latter appealed.

Murray Hoffman, for the appellant.

John Anthon, for the respondents.

THE CHANCELLOR. As the constitution gives to parties an appeal to the chancellor from all inferior equity tribunals, and he legislature has made no provision authorizing any other person to sit for him, in a case where that officer is related to one of the parties, the chancellor is bound to hear the appeal; even where a near relative is personally interested. This was done by Chancellor Kent; who took jurisdiction of, and heard, a litigated cause, in which his brother was one of the parties, and personally interested. He also heard and decided the case of *Moors v. White*, (6 *John. Ch. R.* 360,) where his brother-in-law was the complainant; the legislature not having authorized

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any other person to sit for the chancellor, in such a case. The statute, it is true, prohibits any judge from sitting, where he is related to either of the parties within the ninth degree, of affinity or consanguinity; but it has not provided for any other person, or tribunal, to exercise the appellate power, which is given to the chancellor, by the constitution, in such cases. The constitution must, therefore, control; as that is the paramount law.

Again; there does not appear to be any valid objection in principle, to my hearing the appeal in this case. For the subject matter of the appeal is now, by operation of law, transferred to the new assistant register, who is not a relative; if that subject matter ever belonged to the late assistant register, under the decree which was made more than twenty-five years before he came into office. And it appears by the petition, in this case, that the law courts, as well as the vice chancellor, have decided that the appellant held the legal title to the property in controversy in his character of assistant register merely. I must, therefore, hold that I have jurisdiction and am bound to hear this appeal. But it is probably a case in which an order should be entered to have the proceedings continued in the name of the present assistant register; unless he should think proper to submit to the decision of the vice chancellor, and waive the appeal, after investigating the case.

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Where a will was made, and the testator died previous to the revised statutes, but the will was proved, before the surrogate, after the first of January, 1830, and before the passage of the act of May, 1837, concerning the proof of wills, &c. *Held* that the formalities requisite to the due execution of the will were those which were required by the second section of the act of March 5th, 1813, concerning wills; but that the mode of proof must be that which was prescribed by the provisions of the revised statutes, which were in force when the will was propounded for probate.

In a proceeding before the surrogate, to prove a will of real estate, under the provisions of the revised statutes, it is not necessary that each witness to such will

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should be able to swear that all the requisites of the statute, which was in force at the execution of the will, were complied with.

The statute only requires, in such cases, that it should appear from the proof taken before the surrogate, that the will was duly executed, by a testator who was competent to make a will, and who was free from restraint.

Even upon a bill filed to establish a will of real estate, and where the decree is to be conclusive upon the rights of the heirs at law, the court of chancery does not require that each subscribing witness shall be able to recollect, and prove, that all the formalities required by the statute were complied with.

The rule of the English court of chancery is, that upon such a bill, all the subscribing witnesses, if living and competent to testify, must be called by the party seeking to establish the will, and must be examined by him; so as to give the adverse party an opportunity to cross-examine them as to the sanity of the testator, and the circumstances attending the execution of the will. And the rule is the same upon the trial of an issue of *devisavit vel non*, awarded by the court of chancery. But it is not necessary that all the witnesses should testify to the due execution of the will, and that the testator was of sound and disposing mind and memory at the time of the execution thereof.

Where there is an infirmity in the recollections of the attesting witnesses, as to what took place at the time of the execution of a will, the court will not require positive and affirmative evidence that all the formalities required by the statute were complied with; but will look to all the circumstances of the case, in forming its conclusions of fact upon that subject.

It is necessary that the attesting witnesses should see the testator, or some one for him, sign the instrument which they are called upon to witness; or that the testator should either say or do something, in their presence and hearing, indicating that he intends to recognize such instrument, or paper, as one which has been thus signed by him, and upon which his name appears, as a valid will; or as having been signed by his authority, for the purposes therein expressed.

But it is not necessary that the testator should, in express terms, declare that his name, signed to the will, was so signed by him, or that it was so signed by his authority and direction, and in his presence.

The production of the will, with his name subscribed to it, and in such a way that the signature can be seen by the testator and by the attesting witnesses, and the request of the testator that they should witness the execution of the instrument by him, or as his will, would of itself be a sufficient acknowledgment, of his signature, to render the will valid, under the provisions of the act of March 5, 1813, concerning wills.

The most liberal presumptions in favor of the due execution of wills, are sanctioned by courts of justice, where from lapse of time, or otherwise, it might be impossible to give any positive evidence on the subject.

Accordingly, a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact.

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And where any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signatures is received, as secondary evidence of the facts to which they have attested, by subscribing the will as witnesses to the execution thereof

THIS was an appeal from a decision of the circuit judge of the first circuit, affirming the sentence and decree of the surrogate of the city and county of New-York, admitting the will of William Jauncey, deceased, to probate, as a valid will of real estate, and allowing it to be recorded. The will bore date in May, 1825, and was propounded for probate, as a will of real estate, under the provisions of the revised statutes, in 1835. The testator's name and seal were affixed to the same, at the end thereof, and the will was attested by three witnesses, whose names were written at the end of the following attestation clause: "Signed, sealed, published, and declared by the said William Jauncey, the testator, as and for his last will and testament, in the presence of us who were present at the signing, sealing and publishing thereof." There was no dispute as to the testator's capacity to make a will, and to understand the contents thereof. But it was insisted, on the part of the appellants, that the instrument propounded, was not proved to have been executed and attested in the manner required, by the law in force at the time of its date, to render it a valid will of real estate. Isaac Jones, one of the subscribing witnesses, was the testator's barber. James Apps, the second witness, was a servant in the family; and the third, Charles Robinson, was the testator's coachman. Jones testified, in substance, that he was in the habit of attending the testator daily at his house. As he was about leaving one day, the testator said to him, if he was not in a great hurry, he would get him to witness his signature to a paper. The testator thereupon produced the instrument propounded, and putting his finger on the signature and seal, declared that he acknowledged it as his hand and seal for the uses and purposes therein mentioned, and Jones then subscribed his name thereto as a witness, in the presence of the testator. He, Jones, was at first alone in the room with testator, while dressing his hair. The testator went to the door and called for

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the other two subscribing witnesses. They accordingly came, while Jones was present, and both signed their names to the instrument, as witnesses, in his presence. The name of William Jauncey, the testator was subscribed to it, when he acknowledged the instrument. This witness, upon his cross-examination, stated that he knew nothing of the contents of the paper, or what it was, until sometime afterwards, when the testator told the witness he wished to remind him that he was a witness to his will. Jones further testified, that he could not recollect that the testator made any observation, or said any thing to Apps or Robinson when they witnessed the instrument.

Apps, the second witness, testified that some one told him Mr. Jauncey wanted him in the parlor. He then went up and the testator enquired if he was James, and being answered in the affirmative, the testator pointed to a paper on the table, and told him to sign his name to it as a witness, under that of Jones, and he subscribed his name accordingly, in the presence of the testator, as a witness to the instrument propounded; and, as this witness believed, the testator said it was his will. He did not, however, recollect whether the testator's name was to it when he subscribed, it or not. But he recollected that the testator observed to him, while he was in the room, that he understood he was going to England, and if so, he would be handy to prove his signature to the paper, as he might probably be wanted for that business in England. Upon his cross-examination, this witness testified that he did not recollect whether Jones was present or not; that Jones' name was not written after he, Apps, got into the room, but it was there when he subscribed; that he was in the room about five minutes, but he did not remember any other person being in the room except the testator, who did not leave the room while he was there. He was resting or standing near the table.

Robinson, the last subscribing witness, testified that he was called on by the testator to witness the will; that the testator did not subscribe his name to it in his presence, but it had previously been written by him. The testator put a pen in deponent's hand,

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and acknowledged and declared the instrument to be his will, and requested him to sign his name to it, as a subscribing witness, and he did so, in the presence of the testator; who remarked, that Apps was going to England, and would be handy to prove the will there, in case it should be necessary. Upon his cross-examination, this witness testified that Jones and Apps, the other two subscribing witnesses, were present when he attested the will, but he did not see them subscribe their names, as their names were subscribed before he entered the room; that the testator was standing up near the table when he attested the will.

The parties opposing the will, before the surrogate, objected, among other things, that the instrument propounded had not been duly proved, because it was not, at the time of its attestation, duly published and declared as the will of the testator; nor had it been signed by the testator in presence of all the subscribing witnesses; nor had his signature been acknowledged to all of them. But the surrogate decided that the will was duly proved, and he admitted it to be recorded as a valid will of real estate; it having, previous to the revised statutes, been admitted to probate as a will of personal property. His decision was affirmed, upon an appeal to the circuit judge. The parties contesting the will thereupon appealed to the chancellor. And the executor and trustee, who propounded the will for probate before the surrogate, having died subsequent to the order of affirmance by the circuit judge, the proceedings were revived against the devisees, and other persons beneficially interested in the real estate under the alleged will. (*See Jauncey v. Rutherford*, 9 *Paige's Rep.* 273, S. C.). Upon the argument of the appeal before the chancellor, the counsel for the respondents agreed to waive all formal objections, if any such existed, as to the manner of reviving the proceedings upon the appeal; the respondents reserving the right to claim the benefit of the new facts stated in their answer to the petition of appeal, so far as they could legally avail themselves thereof. And it was further agreed, that if any of the parties, named in the petition of appeal, had died or married, since the commencement of the

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proceedings to revive, the decree upon the appeal should be entered *nunc pro tunc*, so as to precede such death or marriage.

J. C. Spencer, for appellants. The paper writing purporting to be the last will and testament of William Jauncey deceased, is not attested, and is not proved to have been executed, in the manner required by the then law, to entitle it to be recorded as a will of real estate. In this proceeding all the witnesses must be examined; and they should corroborate each other as to the facts necessary to prove a valid execution of the will. At all events it must be proved, by some one or more of the witnesses, that all the facts necessary to a valid execution of the will, were known, at the time, to each and all of the witnesses; and that each of them did what the law required of them, to complete the will. In this case the other witnesses do not prove a single requisite of the statute to have been complied with, to the knowledge of the witness James Apps.

It was necessary, under the act of 1813, concerning wills devising real estate, (1 R. S. 464,) 1. That the will should be signed by the testator by his own hand, or by the hand of another. 2. That each of the three witnesses should attest the execution of the will—that is, the signing by the testator—without which it could not be executed. 3. As nothing can be attested by a person which he does not himself know, or believe to be true, the statute, in requiring attestation, required also the previous knowledge by the witness of the factum that the will was signed—that there was a signature to it purporting to be that of the testator. 4. It also requires that the witness should know that such signing was by the testator, or by his direction; or otherwise he would attest what, as to him, was a falsity—or at least, what he did not know to be true. The knowledge thus required by the statute may be derived from having seen the act performed, the actual signing, or from the acknowledgment of the fact by the testator. Such acknowledgment, being allowed by the court, as a substitute for actual seeing by the witness, should be as explicit, and have as direct reference to the fact, as the other species of evidence for

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which it is substituted, and should therefore point directly to the factum of signing.

The few cases in which loose declarations of the testator respecting the paper being his will, or of his requesting witnesses to sign it, without their knowing that the testator's signature was actually to the paper, and without direct reference by him to the signing, are contrary to the spirit and letter of the statute, are opposed to the earlier and sounder decisions, are not binding on this court, and have been in effect overruled by recent decisions, upon the new English statute, and upon our revised statutes, which in this respect do not differ from the old law.

The subscription of the witness required by the statute, is but evidence of attestation, in the absence, or during the incompetency of the witness; and when the witness is examined and is competent, and recollects the facts and circumstances, the subscription itself is of no avail to prove attestation. It is not proved by any witness that the testator signed the will in the presence of Charles Robinson, or of James Apps, two of the subscribing witnesses. It is not proved that James Apps knew that the testator's name was subscribed to the will, at the time he subscribed it. Nor is it proved that James Apps knew that the testator's name was signed to the will by the testator or by his direction, at the time he witnessed it. The declarations of the testator, as proved, did not communicate any such knowledge to the witness Apps. Apps therefore could not attest the execution of the will, and his subscribing it is not evidence of attestation, when explained by his testimony. The will has not been attested by Apps, although subscribed by him. Apps' testimony does not establish the execution of the will, either by the actual signing of it by the testator, or by his acknowledgment of such signature. And the same point is applicable to the testimony of Charles Robinson.

D. Lord, for respondents. I. The validity of the execution of this will is to be determined according to the law in force at the time it was made.

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The will was actually signed by the testator. This is proved, 1. By the acknowledgment of his signature to Jones; 2. By telling Apps it was his will and that he could prove testator's signature; 3. By the acknowledgment before Robinson that it was his will. Acknowledgment of the signing, or that the paper is his will, is proof of signing. The three witnesses above named signed the attestation in the testator's presence.

If proof were necessary, that the testator, at the time of execution, knew that the paper was his will, such proof exists in the testimony of Apps and Robinson as to what took place at the time of attestation, and of Jones as to the subsequent recognition of that as an existing fact.

Geo. Griffin, for the same parties. The proceeding before the surrogate was not in the nature of a bill in chancery to establish a will; but was a proceeding under the statute—analogueous to the old proceedings before courts of common law to admit wills to be recorded. The statute respecting wills is binding upon courts of law as well as of equity. Both courts are bound to hold as sacred, and to sustain, as far as possible, the most sacred of all human instruments—the will of a dying man. The statute is adopted from the English statute of Charles 2; which was passed here soon after the revolution, and has since been re-enacted several times. And when the legislature re-enacted it, they re-enacted it with all the adjudications which had been made under it.

Under the statute, there are three requisites essential to the validity of a will. 1. That the will should be in writing. The will, in this case, was in writing. It is not denied that it was in writing. 2. That it should be signed by the testator. We must therefore prove the signing. But it is not necessary it should be proved by three witnesses. Proof by one witness is enough. That is sufficient in all cases, unless a statute requires that proof should be made by three. A will has been proved and established by other persons, against the testimony of all the subscribing witnesses. (1 *Wm. Black. Rep.* 365.) That was a case of conspiracy, among the witnesses, to defeat the

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will. While courts will take care that false wills are not established, they will take equal care that real wills are not defeated. The answer to the petition of appeal, in this case, states that the will was all written by the testator himself, in his own hand-writing. The new matter thus introduced was properly before the court. The proceeding before the surrogate is analogous to proceedings in the prerogative court. And that court allows new matter to be produced, on appeal. The declaration of the testator, to the witness Jones, that the instrument was his hand and seal, was equivalent to an assertion that it was all in his hand-writing. That declaration did not relate merely to his signature, nor to the seal. 3. It is necessary, under the statute, that the will should be subscribed by three witnesses, in the presence of the testator. But the witnesses need not subscribe at the same time. Days, months, and years may intervene between their several signatures. And delay, instead of affecting injuriously the validity of the will, serves to give it a deliberative character, which perhaps carries a greater weight with it than a will possesses which is executed and witnessed by all the witnesses, at the same time. But in this case the witnesses did subscribe simultaneously.

This will, then, has the requisites of having been in writing, of being signed by the testator, and subscribed by the witnesses in his presence—all the requisites pointed out in the statute.

The subscribing witness must be convinced of the signature of the testator. The *quo animo* he signed it, is all important also. It must have been done *animo testandi*. This is what gives vitality to the instrument, and breathes into it the breath of life. It is not necessary the subscribing witnesses should see the testator write his name. An acknowledgment by him, to them, that he has executed it, or that it is his act and deed, is sufficient. This principle has become established by the lapse of centuries. It has taken root firm as mother earth herself. This acknowledgment is a sufficient publication. It is not necessary the testator should tell the witnesses it is his will. It is sufficient if he announces it to be his act and deed. This

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is the important thing to be done. The case does not hang on a name. Signature is but a part of the *res gestæ*. 'Tis but the vestibule of the great interior of the transaction. The attestation of a will is not dissimilar to the acknowledgment of a deed. The statute relative to deeds requires a deed to be acknowledged, to authorize it to be recorded. And the statute respecting wills requires that they should be attested, to become efficacious. So if the testator acknowledges that the will is his act and deed, it is sufficient. The acknowledgment of the testator to Jones, that he executed the will for the uses and purposes therein mentioned, was sufficiently full and explicit. And his saying to the same witness, some time after the execution of the will, "Recollect that you witnessed my will," was equivalent to a similar declaration made at the time it was executed. And his saying to Robinson, the last witness who signed, while the others were present, that the instrument was his will, was tantamount to a declaration made to all. Apps does not remember whether the testator's signature was there when he signed his name; but he swears that the testator announced the instrument to be his will. The presumption is that he said this before the witness had signed his name. His swearing merely upon belief is not confined to this part of his testimony. His belief is a kind of moral stuttering; and whatever he swears to he qualifies, by expressing his belief. Three persons, after a lapse of ten years, cannot be expected to have an identity of recollection respecting a particular transaction. Difference of recollection, as to details, is an evidence of honesty. If, after a great lapse of time, several witnesses concur in every minute particular, it affords just ground for suspecting collusion.

It is not denied by the counsel for the appellants, that an acknowledgment is sufficient. But they insist that the testator must, in terms, acknowledge his signature. We insist it is sufficient if he acknowledges the instrument to be his will. The statute requires that the *will* shall be attested, not the *signature*. If the will was the testator's, then the signature was his; and if he acknowledged the will to be his, he acknowledged the signature to be his, for that is an essential part of the instrument.

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Geo. Wood, in reply. Even if this were a purely ecclesiastical case, the parties would be confined to the evidence introduced in the court below. The allegations in the answer to the petition of appeal, therefore, are not admissible as evidence here. This is a question concerning real estate; a subject over which ecclesiastical courts have no jurisdiction. Consequently no analogy exists which renders the practice of those courts applicable.

Admitting that all the witnesses heard, and heard in due season, the acknowledgment of the testator that it was his will, that was not sufficient. The acknowledgment must be of the act of signing; and there must be a special, direct reference to the signature. One witness is not sufficient to make out all the facts essential to the validity of a will. It is requisite that all the subscribing witnesses should be able to testify to the existence of those facts. It will not be inferred that all the witnesses knew the will to be in the testator's hand-writing.

The statute respecting wills is a remedial statute, and it should be so construed as to correct the mischief it was intended to prevent. The object of the statute was to guard against fraud, the importunities of relatives, and undue influence on the part of proteges, &c. This species of undue influence is like the pestilence which walks at noonday, but walks unseen. Its presence is only felt by experiencing its deleterious influence. It can only be counteracted by a rigid enforcement, by the courts, of the requirements of the statute.

THE CHANCELLOR. The will in this case was made, and the testator died, previous to the revised statutes; but the will was proved before the surrogate, after the first of January, 1830, and before the passage of the act of May, 1837, concerning the proof of wills, &c. (*Laws of 1837*, p. 524.) The formalities requisite to the due execution of the will, therefore, were those which were required by the second section of the act of March 5th, 1813, concerning wills. (1 *R. L. of 1813*, p. 364.) But the mode of proof must be that which was prescribed by the provisions of the revised statutes which were in force when

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the will was propounded for probate, before the surrogate, in 1835. The appellants' counsel, in their first point, insist that in a proceeding before the surrogate to prove a will of real estate, under the provisions of the revised statutes, all the witnesses to such will, who are living in the state and of sound minds, must not only be produced and examined, but that they must also corroborate each other as to the facts necessary to the valid execution of the will. In other words, that each witness must be able to show that all the requisites of the statute which was in force, at the execution of the will, were complied with. This question I will first proceed to consider.

The article of the revised statutes relative to wills of real property and the proof of them, as it existed in 1835, provided that upon proof being made of the due service of the notice of the application to prove a will of real estate, the surrogate should cause the witnesses to be examined before him, and should reduce the proofs and examinations to writing. And that all the witnesses to such will, who were living in the state, and of sound mind, should be produced and examined; and that the death, absence, or insanity of any of them, should be satisfactorily shown to such surrogate. (2 R. S. 58, § 12.) The thirteenth section directed that, when any one or more of the subscribing witnesses to the will should be examined, and the other witnesses were dead, or resided out of the state, or were insane, then such proof should be taken of the hand-writing of the testator, and of the witness or witnesses so dead, absent, or insane, and of such other circumstances as would be sufficient to prove such will on a trial at law. The next section provided that *if it should appear, upon the proof taken, that such will was duly executed*, that the testator, at the time of executing the same, was in all respects competent to devise real estate, and was not under restraint, the will and the proofs and examinations so taken should be recorded, and the record thereof signed and certified by the surrogate. These were all the provisions of the revised statutes relative to the probate of a will of real property, where all or any of the subscribing witnesses were alive and could be examined. And in all such cases the al

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lowing of probate, by the surrogate, and admitting the will to be recorded, rendered the original will, or the record of the proof thereof, prima facie evidence of the due execution of such will; but subject to be rebutted by contrary proof. (2 R. S. 58, § 15.)

It will be seen by reference to these several provisions of the revised statutes, which are substantially the same with those which were previously in existence, except as to the tribunal in which the proof was to be taken, that nothing is said as to the necessity of each witness being able to prove that all the formalities required by law were complied with, where all the subscribing witnesses are alive and in a situation to be examined. The statute only requires, in such cases, that it should appear from the proof thus taken, that the will was duly executed, by a testator who was competent to make a will, and who was free from restraint. Even upon a bill filed to establish a will of real estate, and where the decree is to be conclusive upon the rights of the heirs at law, the court of chancery does not require that each subscribing witness should be able to recollect, and prove, that all the formalities of the statute were complied with. The rule of the English court of chancery is, that upon such a bill, all the subscribing witnesses, if living and competent to testify, must be called by the party seeking to establish the will, and must be examined by him; so as to give the adverse party an opportunity to cross-examine them as to the sanity of the testator, and the circumstances attending the execution of the will. (*Townsend v. Ives*, 1 Wils. Rep. 216; *Ogle v. Cook*, 1 Ves. sen. 177; *Hudson v. Kersey*, 4 Burn. Eccl. Law, 102.) And the rule is the same upon the trial of an issue of *devisavit vel non*, awarded by the court of chancery. (*Booth v. Blundell*, Coop. Chan. Ca. 136.) But I have not been able to find any case in which it has been held to be necessary that all the witnesses should testify to the due execution of the will; and that the testator was of sound and disposing mind and memory, at the time of the execution thereof. On the contrary, in the case of *Lowe v. Jolliffe*, (1 W. Black. Rep. 365,) upon a trial at bar in the court of king's

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bench, on an issue of *devisavit vel non* out of chancery, the will was established, although all the subscribing witnesses swore that the testator was utterly incapable of making a will, or of transacting any other business whatever, at the time the will in controversy was supposed to have been executed. And all the subscribing witnesses in that case were subsequently convicted of perjury. (See *King v. The Nueys & Galeys*, *Idem*, 416.) Our statute provides, in express terms, that if any one of the subscribing witnesses is examined, and the others are dead or incompetent, or out of the jurisdiction of the state, the will may be admitted to probate, upon proof of the handwriting of the testator and of the witnesses who cannot be examined, and of such other circumstances as would be sufficient to prove such will on a trial at law. I cannot believe, therefore, it would be a proper construction of this statute to reject the probate of a will, where all the subscribing witnesses are competent and are actually examined, upon the very narrow ground that some of them cannot, after ten years, recollect that all the requisites of the statute of wills were complied with. The next question for consideration, therefore, is, whether it appears, upon the proofs taken before the surrogate in this case, that the instrument propounded for probate as the will of William Jauncey, was duly executed as a will of real estate.

The second section of the act of March 5th, 1813, in reference to the execution of wills of real estate, is the same in substance as the provision of the statute, 29th Charles 2d, c. 3, on that subject. And the decisions in the English courts, under the last mentioned statute, especially such as were made previous to our separation from the mother country, are proper to be taken into consideration, in determining the question whether the instrument propounded is proved to have been duly executed, according to the requirements of the act of 1813. The language of the last mentioned act is, that "every such last will and testament shall be in writing, and signed by the party making the same, or by some other person, in his presence, and by his express direction; and shall be attested, and subscribed in the presence of such party, by three or more credible witnesses, or such last

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will and testament shall be utterly void." (1 R. L. 1813, p. 364, § 2.) Two questions arose under the English statute, soon after its passage, which are to some extent involved in the decision of this case. The first was, whether it was necessary that the testator should actually sign the will in the presence of the attesting witnesses; and the second, whether it was necessary that he should publish it, as a will, in the presence of such witnesses. Both of these questions arose in the case of *Peate v. Ougley*, (Com. Rep. 197,) on the trial of an ejectment suit, before Chief Justice Trevor, some thirty years after the passage of the statute. And if the recollection of the witness was to be relied on, as to what actually occurred at the execution of the will, his lordship decided both those questions in the negative. Very little reliance, however, is to be placed upon that case, as a judicial decision, upon either of the questions referred to. For it was, at the best, a mere *nisi prius* decision; and it appears to have been submitted to the jury, as a question of fact, whether the provisions of the statute had been complied with. And, under the circumstances of that case, I think the jury were authorized to presume that the will was not only signed in the presence of all the subscribing witnesses, but that it was also published by the testator as his will, in their presence. Two of the witnesses were dead, and the survivor was examined twenty-seven years after the will was executed. It is hardly probable, therefore, after such a lapse of time, that he would recollect what occurred at the execution of the will. And the circumstances having passed from his mind, he might very naturally suppose he did not see the testator write his name to the will, or hear him tell the witnesses what the instrument was which they were called upon to attest the execution of. But the attestation clause, which was in the hand-writing of the testator, in that case, stated that the instrument which the witnesses were called on to attest, was signed, sealed, and published as his will, in their presence.

In reference to the first question, however, the case of *Le-maine v. Stanley*, (3 Lev. Rep. 1,) and the case in *Skinner*, (Anon Skin. Rep. 227,) must have assumed the ground that

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an actual signing of the will, by the testator, in the presence of all the subscribing witnesses, was unnecessary; though I think the first case was an erroneous construction of the statute, as to what a signing of the will by the testator really was. Independent of those cases, it has been deliberately settled, in England, for nearly a century, that the statute of 29th Charles 2d, chapter 3, did not require the testator to sign his will in the presence of the attesting witnesses, provided it was actually signed by him, previous to his acknowledgment and publication of the will in the presence of all or each of those witnesses.

In *Stonehouse v. Evelyn*, which came before Sir Joseph Jekyl, the master of the rolls, in 1734, (3 *Peere Wms. Rep.* 253,) the proof was full that all of the attesting witnesses subscribed their names to the will in the presence of the testatrix. But one of them said he did not see her sign the will; but she owned, at the time the witnesses attested it, that her name, signed thereto, was her own hand-writing. His honor held that, without doubt, that was sufficient. And the reporter adds, that on the same day, he mentioned that decision to Justice Fortescue Aland, formerly a judge of the king's bench, and then one of the justices of the court of common pleas, who said it was the common practice, and that he had so ruled two or three times, upon evidence, at the circuit; and that it was sufficient if one of the subscribing witnesses swore that the testator acknowledged the signature to be his own hand-writing. The question came before Lord Hardwicke, eighteen years afterwards, in the case of *Grayson v. Atkinson*, (2 *Ves. sen.* 454,) and he decided that it was not necessary that the testator should sign the will in the presence of the witnesses; but that an acknowledgment by him to the attesting witnesses that it was his hand, was sufficient. Two years afterwards, the case of *Ellis v. Smith*, (1 *Ves. jun.* 12,) came before his lordship, assisted by the master of the rolls, the chief justice of the common pleas, and the chief baron of the exchequer. And the question was there deliberately decided, that the acknowledgment of the testator, before the attesting witnesses to a will

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previously signed by him, was equivalent to signing it before them, and was a good execution of the will. Since this last decision, in 1754, the law appears to have been unquestioned in England, that under the statute of Charles 2d, it is not necessary to the validity of a will of real estate that the testator should have signed it in the presence of the subscribing witnesses. And this construction of the statute appears to have been followed in this state, and in most of the states of the union which have adopted the language of that statute, in prescribing the formalities to be observed in the execution of wills.

It was also settled in England, at a very early day, that a will of real estate, attested by three witnesses, who at several times subscribed their names, in the presence of the testator and at his request, was valid, although all the witnesses were never present at the same time. (*Anon. 2 Chan. Ca. 109. Cook v. Parsons, Prec. in Chan. 184. Jones v. Lake, 2 Atk. 176, n.*) It is at least doubtful whether the decisions upon either of these questions were in conformity with the intention of the framers of the provisions, in the statute of Charles, relative to the execution of wills of real estate. But they are in conformity with the letter of the statute, which only required that the will should be signed by the testator, but not that such signing should take place in the presence of the attesting witnesses. Nor did the statute, in terms, require the witnesses to attest the will at the same time, and in the presence of each other, but only that the will should be attested by three witnesses who should subscribe the same in the presence of the testator. These decisions had been so long acquiesced in as to have become a rule of property previous to the revolution. It is therefore too late to disturb them, in reference to any rights which had accrued under wills previous to the revised statutes; or even since, so far as the language of the statute has not been changed.

This construction of the statute having been established, the question naturally arose what it was that the subscribing witnesses to the will were to attest? the fact that the testator had actually signed the instrument, and that he recognized or published

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ed it as his will, or only the fact that he acknowledged the execution of the instrument to which he requested them to subscribe their names as witnesses; leaving the facts that it had been actually signed by him, or by his direction and in his presence, and that he intended it as a testamentary disposition of his property, to be supplied by other proofs, if necessary? Upon a careful examination of the cases on this subject, in England, I am not prepared to say that the question as to the necessity of an admission of his signature, or of a recognition of the instrument by the testator as a will, to and in the presence of the attesting witnesses, at the time they signed their names to such instrument as witnesses, was definitively settled there previous to our declaration of independence. But in a comparatively recent case, (*The Trustees of the British Museum v. White*, 3 *Moore & Payne's Rep.* 689; 6 *Bing. Rep.* 310, *S. C.*) both branches of this question came before the late Chief Justice Tindal, and his associates, and were deliberately decided by them. The case came up in the form of a special verdict found upon the trial of a feigned issue, of *devisavit vel non*, out of the court of chancery. Of course there was no room for presumption that the witnesses, or any of them, had forgotten the circumstances attending the execution of the supposed will. By the special verdict, it appeared that the instrument, which upon its face purported to be the testator's will, was all in his hand-writing, except the signatures of the subscribing witnesses; that immediately above their names there were written these words, in his hand-writing, "In the presence of us as witnesses thereto;" that the testator had signed it before it was signed by the witnesses, or either of them; that about five months before his death he requested two of the attesting witnesses to sign their names to the instrument, and they did so in his presence, but they did not see his signature, nor were they informed by him then, or at any other time, what was the nature of the instrument, or why they were requested to sign the same; that about two months afterwards the testator requested the other subscribing witness to sign his name to the instrument, which he immediately did in the testator's presence, who then inform-

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ed him that it was his will; and that the testator was of sound and disposing mind and memory, at the time he signed the paper himself, and also at the times when the witnesses signed their names to the same. The court, upon a full argument, and after taking time to examine the questions raised, decided in favor of the validity of the will. The question again came before that court, about two years afterwards, and in substantially the same form, in the case of *Wright v. Wright*, (5 *Moore & Pay. Rep.* 316,) upon an issue ordered by the vice chancellor. But the court informed the counsel for the defendant that they intended to adhere to the decision in the case of *White v. The Trustees of the British Museum*; and that if the defendant was not satisfied with it, he could appeal to a higher tribunal, as the question was open to him upon the record.

I am not prepared to go the whole length of these last two decisions. For they establish the principle that, under the statute of Charles, an instrument may be a valid will of real estate, although neither of the subscribing witnesses, at the time they attested its execution, knew or were informed that it was a will, or that it had been signed by the alleged testator, or by any one for him, so as to make it a valid will upon its being duly attested or signed by the necessary number of witnesses. What do the witnesses attest in such a case, where they are entirely ignorant of what the testator is intending to do, or what he has done, or what is the object of obtaining their signatures to the paper which is presented to them for that purpose? Certainly nothing. For they neither attest the instrument as a will, which the testator has in fact, though without their knowledge, already signed, nor the fact that he has signed the instrument in their presence, nor that he has admitted to them that it had been signed by him before that time. Surely the attesting witnesses should see the testator, or some one for him, sign the instrument which they are called upon to witness; or the testator should either say or do something, in their presence or hearing, indicating that he intends to recognize such instrument or paper as one which has been signed by him, as a valid will, or as having been signed

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by his authority for the purposes therein expressed. At the same time, I do not deem it necessary that the testator should in terms declare that his name, signed to the will, was so signed by him, or that it was so signed by his authority and direction, and in his presence. But the production of the will with his name subscribed to it, and in such a way that the signature could be seen by the attesting witnesses, and the request of the testator that they should witness the execution of the instrument by him, or as his will, would of itself be a sufficient acknowledgment of his signature to render the will valid, under the provisions of the act which was in force when this will was made. (*See Devisees of Eelbeck v. Granberry*, 2 Hayw. Rep. 232; *Hall v. Hall*, 17 Pick. Rep. 373; *Cochran's will*, 3 Bibb's Rep. 494; *Ilott v. Genge*, 3 Curt. Eccl. Rep. 172.)

It is a very different question, however, whether, to sustain and establish the validity of a will, the courts should hold it to be necessary for the subscribing witnesses to recollect and testify to the fact that all the formalities prescribed in the statute were actually complied with. For if this were required, very few devises of property would be supported unless the testimony of the witnesses was taken and perpetuated very soon after the wills attested by them were made. This, in many cases, would be wholly impracticable; as the testator frequently lives many years after he has executed his will. And where there is good reason to suppose the will has been duly executed, and that no fraud or want of testamentary capacity existed at the time it was made, justice to the dead as well as to the living, requires that the declared wishes of the testator should not be defeated by the imperfect recollections of the attesting witnesses; or by reason of their deaths or removal beyond the jurisdiction of the state. It is for this reason that the most liberal presumptions, in favor of the due execution of wills, are sanctioned by courts of justice, where from lapse of time, or otherwise, it may be impossible to give positive evidence on the subject. A will may, therefore, be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities re-

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quired by the statute were not complied with, if from other testimony in the case the court or jury is satisfied that the contrary was the fact. And where any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signatures is received, as secondary evidence of the facts to which they have attested by subscribing the will as witnesses to the execution thereof. The same rule is frequently applied to the case of a subscribing witness who is called and sworn, but who, from defect of memory, has no recollection of the transaction except that his signature to the will is genuine. The decisions which have a bearing upon the question, whether the evidence, in this case, was sufficient to establish the fact that the testator subscribed and published the instrument propounded as his will, or recognized the same as having been signed by him, in the presence of the three subscribing witnesses who signed their names in his presence, are very numerous; and it may be useful, in considering that question, to refer to some of them.

In the case of *Hudson's will*, (*Skin. Rep.* 79,) which came before the court of king's bench, on a trial at bar, only five years after the statute of Charles, the will was established against the testimony of two of the subscribing witnesses, who swore the testator did not execute the will, he being incapable of doing so, and that his mark was affixed by another guiding his hand, and that he said nothing; the court and jury being satisfied from other evidence, that the will was duly executed. In the case of *Hands v. James*, (*Comyn's Rep.* 531,) where the witnesses to the will were all dead, it was left to the jury to presume that they subscribed as witnesses in the testator's presence; although that fact was not stated in the attestation clause. And that decision was followed in the subsequent cases of *Croft v. Pawlet*, (2 *Stra. Rep.* 1109,) and of *Brice v. Smith*, (*Willes' Rep.* 1.)

Previous to the English statute of July, 1837, (1 *Vict. ch.* 26,) for the amendment of the law with respect to wills, very few cases arose before the ecclesiastical courts, in England, calling for a construction of the laws relative to the execution of wills of real estate. But that statute requires the same formalities to be ob-

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served in the making of wills of personal property as of real estate. The ninth section of the act requires that the will shall be signed at the foot or end thereof, by the testator, or by some other person in his presence and by his direction, and that such signature shall be made, or acknowledged, by the testator, in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and subscribe the will in the presence of the testator. And since the passage of that statute, several cases, involving the question as to, what evidence is requisite to establish a will under its provisions, have come before Sir Herbert Jenner Fust, the official principal of the arches court and judge of the prerogative court of Canterbury. Although the decisions of that very able and distinguished judge and civilian, are of no higher authority here than those of judges of other courts in England, and in our sister states, having the same experience and knowledge in testamentary cases, they are entitled to great consideration, as judicial opinions upon the examination and decision of the question now under consideration. It will be recollected that the statute, 1 Vict. ch. 26, requires that the signature of the testator shall be made or acknowledged by him in the presence of two or more attesting witnesses, present at the same time. And the decisions of Sir Herbert Jenner Fust to which I shall refer, are mostly upon the question whether these requirements of the statute had been complied with, in making the wills propounded for probate.

In *Chambers & Yatman v. The Queen's Proctor*, (2 Curt. Eccl. Rep. 415,) which came before the prerogative court, in May, 1840, there were three witnesses to the will. One of them swore that it was signed by the testator in the presence of all of them, and that he then put his finger upon the seal, and said, "this is my act and deed," and then they witnessed it as a will, in his presence. Another testified to the acknowledgment of it as a will, but could not recollect that the testator signed it in her presence, or that he said any thing about his signature to it. And the third swore that he did not see the testator sign the will, but that there were a signature and a seal affixed to it; and that when they were requested to wit-

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ness the will, the testator pointed to the seal where his name was already written. The counsel for the crown contended that the will was not executed in conformity to the statute; as two of the witnesses swore that the will was not signed in their presence, and there was no direct acknowledgment of his signature, as such, by the testator. But the learned judge declared he was satisfied, from the evidence, that the will was signed by the testator in the presence of all the witnesses, and that two of them had forgotten the fact. And in the case of *Gove v. Garvin*, (3 Curt. 157,) which came before the same court, two years afterwards, the same learned judge pronounced in favor of the due execution of a will, upon proof by the scrivener, who drew and witnessed the will, that it was signed by the testator, in the presence of him and of the other witness; although the latter, who was not examined until two years after the will was made, was confident that the will was not signed by the testator in his presence, and that nothing was said about his signature.

In the case of *Ilott v. Genge*, (*Idem*, 160,) decided in the same year, the probate of the will was rejected; the testator, at the time he requested the witnesses to put their names to it, having carefully concealed the writing, so that they did not see his name; and having neither signed it in their presence, nor told them it was signed by him. In that case, however, Sir H. J. Fust admits there may be a virtual acknowledgment of his signature by the testator. He says, "it is not necessary that the testator should state to the witnesses that it is his signature; the production of a will by the testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature, under the present statute."

In the case of *Gaze v. Gaze*, (*Idem*, 451,) before the same court, in March, 1843, the testator produced to the attesting witnesses a will, all in his own hand-writing, having his name and seal affixed, and requested them to sign their names under his, or "down here," pointing to a place just below his own name and seal. And the court held that this was a sufficient acknowledgment of his signature, by the testator; although

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there was no certain evidence that the signature was in the testator's hand-writing, and only one of the witnesses knew that it was a will when they were called on to attest it. The case of *Blake v. Knight*, (*Idem*, 547,) came before the same court about two months afterwards, and a similar decision was made. In that case the three attesting witnesses were examined; and the substance of their testimony was, that the decedent did not sign the will in their presence, nor formally acknowledge his signature to them, nor did they recollect to have seen his signature; that the first witness received notice that he, and his son and his apprentice, the three attesting witnesses, were wanted by the decedent to witness his will, and they went to his room accordingly; that he there produced the will, which was written on one side of a sheet of paper, and spread it out upon the table, before them, and said: "This is my will; it is a small will, written on one sheet of paper and all on one side; will you witness it?" and that they then subscribed their names to it as witnesses, in his presence, no other person being in the room. It further appeared, that the testator had formerly been a writer in an attorney's office, and that the will was in his own hand-writing; the attestation clause, upon its face, being in such a form as to show that all the provisions of the recent statute had been complied with, in executing the will. His honor said he had not a doubt that the name of the testator was signed to the will before the witnesses attested it, any more than if they had positively sworn to the fact, and that the memory of the witnesses had failed them, the transaction having taken place more than four years previous to their examination; that the court could not safely trust to the memory of witnesses under such circumstances, but must attend to the facts of the case, and say whether it was satisfied that the name of the deceased was to the will when the witnesses signed, whether signed in their presence, or signed beforehand and acknowledged in their presence. He therefore pronounced for the validity of the will. The like decision was made, by him in July, 1843, in the case of *Keigwin v. Keigwin*, (3 *Curt.* 607.) There the two subscribing witnesses testified that they were at work in the house

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of the testatrix; that on the day of the date of the will, she brought a paper into the room where they both were, which they identified as the instrument propounded for probate; that she brought a pen and inkstand with her, and said to them, "I want you to sign this paper," and pointed to the place where they were to sign; that the paper was folded so that they only saw her signature, which was then affixed to it; that they both subscribed it accordingly in her presence; that they had no recollection of her having pointed out her signature to them as being her name, but they were certain she did not say any thing in particular about her hand-writing. The will had been prepared at the request of the testatrix by a friend, and left with her; and he dated it on that day because she told him she should have some men to work for her at that time who could attest its execution. His honor said the will was executed according to the requirements of the statute, and that there was a sufficient acknowledgment of her signature; that it was not necessary for her to say, in express terms, "that is my signature;" but it was sufficient if it clearly appeared that the signature was existent on the will when she produced it to the witnesses, and was seen by them when they did, at her request, subscribe their names as attesting witnesses. In the case of *Cooper v. Bockett*, (*Idem*, 648,) which came before the same judge a few days afterwards, he decided in favor of the will, upon the facts testified to by the attesting witnesses, and the appearance of the will itself, which was all in the hand-writing of the testator, although both subscribing witnesses, two ignorant servants in the house, thought the testator's name had not been subscribed to the will when their subscriptions were made. I have doubts as to the correctness of this last decision, however, if the learned judge was right in supposing that, under the recent English statute, the signing of the testator must actually precede the subscriptions of the witnesses, and that it is not sufficient for him to sign the will the moment after, in their presence and under their cognizance. For the impression which the testimony in that case makes upon my mind, as to the matter of fact, is that immediately *after* the witnesses had

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subscribed their names, the testator took the pen and wrote his own name, saying to them at the same time, "this is my name in your presence;" which any testator, who was ignorant of the previous decisions of the court upon the question, might have supposed was the same thing as if he had signed his name the instant before the witnesses subscribed theirs. It may also be remarked, in relation to the last case, that the witnesses must have been examined within four or five months after they attested the execution of the will, which is also a circumstance in favor of the probable accuracy of their recollections as to what actually took place. But a wrong conclusion, by a judge, upon a matter of fact, does not detract from the value of his opinion upon a question of law which is involved in his decision; unless the legal principle decided by him would, if established, have a tendency to lead the mind to wrong conclusions as to matters of fact.

I have intentionally omitted to refer to several other cases in the prerogative court, which are to be found in Curteis' Reports, having a bearing upon the question now under consideration, because they arose upon summary applications, and were decided *ex parte*. The only other case, in that court, to which I shall refer, was decided upon contestation, in June of the present year. It is the case of *Le Bas v. Gregory & McCulloch*, (10 *Lond. Jur. Rep.* 718;) and it contains a reiteration of the principle embraced in the previous decisions, which I have stated more at length. I only refer to it, therefore, to show that down to this time the opinion of Sir Herbert Jenner *Just* remains unchanged, that where there is an infirmity in the recollections of the attesting witnesses, to a will, as to what took place at the time of its execution, the court does not require positive and affirmative evidence that all the formalities required by the statute were complied with; but that it will look at all the circumstances of the case, in forming its conclusions of fact on that subject. It also may be fairly inferred from this recent decision, that none of the numerous decisions in the prerogative court to which I have referred have been overruled or questioned in the court of appeals; which is the judicial committee of

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the privy council. The case of *Hudson v. Parker*, (1 *Rob. Ecel. Rep.* 24; 8 *Lond. Jur.* 786, *S. C.*.) decided by Dr. Lushington, in July, 1844, and referred to by the counsel for these appellants, upon the argument in the present case, is not in conflict with any of the decisions of the learned judge whose seat Dr. Lushington temporarily occupied; although he evidently doubts the correctness of the decision of the court of common pleas in the case of *White v. The Trustees of the British Museum*.

The cases in our own country are also in conformity to these decisions in the ecclesiastical courts in England. In *Jackson v. La Grange*, (19 *John. Rep.* 386,) the question arose, as to the due execution of a will, after a lapse of twenty-five years. One subscribing witness was dead. Another, who was examined upon the trial, proved his own signature as a witness, but could not recollect whether all the subscribing witnesses were present. Nor could he remember any of the circumstances attending his own attestation, or the execution of the will by the testator; but he presumed it must have been executed in his presence, from the fact that he had witnessed it. It appearing that the other surviving witness was alive and within the jurisdiction of the court, it was very properly held that he should have been called and sworn. But the late Chief Justice Spencer, who delivered the opinion of the court in that case, said, if the third witness had been called and his recollection had also failed him, still if he could have proved his signature, it would, upon proving the signature of the testator, have been sufficient proof of the due execution of the will to entitle it to be read in evidence; that the law did not require impossibilities, and where a will had been executed a long time, it was not ordinarily to be expected that the witnesses would be able to remember all the material facts.

In the case of *Pate's adm'rs v. Joe*, (3 *J. J. Marsh. Rep.* 113,) in the court of appeals of Kentucky, the question arose upon an appeal from a decision of a county court, admitting the will of T. Pate to be recorded, as fully proved. The testator, who lived in Kentucky, went to Virginia, and on his return was taken sick and died on the road. He fell in company with

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William Compton and his family, consisting of his wife Polly and his brother Elias E. Compton, and travelled with them; and, being too unwell to ride on horseback, he got into their wagon and rode there. On the night the will was written, he complained of being very sick, and expressed a wish to get to a house where he might write or have a will written. When they stopped a room was procured, and Elias E. Compton was engaged in writing a will for him. The instrument produced for probate was in the hand-writing of Elias, who was then dead, and the name of the testator was also in the same hand-writing. And the will was attested by William Compton and his wife, and by his brother Elias; only two subscribing witnesses being required by the laws of Kentucky. The signatures of the two brothers were in their own hand-writing, but the name of Mrs. Compton, the third witness, was subscribed by her husband. She was examined as a witness, several years after the occurrence, but could recollect nothing of the circumstances except that Pate was sick, and rode in their wagon, and was left on the road. Her husband stated that he had no recollection of having signed his name to the will as a witness, nor any recollection that it was acknowledged before him by Pate, or of seeing his brother write the name of Pate, or that the latter gave any directions to his brother to sign the will for him. He further stated that his habit was never to witness any instrument without seeing the party executing it make his signature, or hearing him acknowledge the instrument; from which circumstance he supposed Pate acknowledged the will in his presence, or he would not have attested it. But under what circumstances he witnessed it he could not recollect; nor had he any recollection of the fact of his signing his wife's name to the instrument as a witness, but he should not have done so without her consent. The will liberated the testator's slaves, when they should attain certain ages; and it fell into the hands of one of the testator's sons, after his death, and was produced by the son, on his being called upon to do so by a bill in chancery. Upon these facts the court of appeals decided that the will was sufficiently proved; and affirmed the decision

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of the county court admitting it to probate. (See also *Bailey v. Stiles*, 1 *Green's Ch. Rep.* 221; *Jackson v. Van Dusen*, 5 *John. Rep.* 144; *Givin v. Radford*, 2 *Litt. Rep.* 137; *Alsey Howard's will*, 5 *Monroe's Rep.* 199.) The case of *Burwell v. Corbin*, (1 *Rand. Rep.* 131,) cited by the counsel for the appellants, was a decision by a divided court; and was virtually overruled in the subsequent case of *Dudleys v. Dudleys*, (3 *Leigh's Rep.* 436.) And Judge Cabell, who concurred in the decision in the case of *Burwell v. Corbin*, admitted that the ground upon which he, and two other members of the court, proceeded in that case was wrong; and that their decision could only be sustained upon the ground that the case came before them in the shape of a special verdict, and that even then it should have been sent back for a new trial. The principle of the several decisions which I have referred to, upon the branch of the case now under consideration, remains unshaken by any conflicting decision of sufficient weight to induce me for a moment to doubt the correctness of such principle.

Applying that principle, to the testimony of the witnesses to this will, I think the evidence was sufficient to authorize the surrogate to find and declare, as a matter of fact, that the instrument propounded was duly executed, by William Jauncey, as a valid will of real estate. There is no pretence that the testator was not in the full possession of all his mental faculties, and perfectly competent to make a testamentary disposition of his estate, with sense and judgment. It does not appear who drew the will. For although it is stated in the answer to the petition of appeal and revivor, that it was wholly in the testator's hand-writing, that fact was not in evidence before the surrogate, and therefore ought not now to be taken into consideration, in determining the question whether he decided correctly upon the evidence before him. But it clearly appears that the testator had in his possession a will, properly prepared for execution, purporting upon its face to dispose of property, to a large amount, in this country and also in the English funds; that when he was alone with his barber, he produced this instrument and re-

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requested the barber to stay and witness his *signature* to it; and that he went to the door of his room and called for the two other subscribing witnesses, who were servants in the house, to come into the room. And he particularly inquired for James Apps, who, as it subsequently appeared, he had understood was intending to return to England, and who, as he said, would be handy to prove his signature there. All this denotes care and deliberation; and shows that the testator himself perfectly understood what he was doing, and that he was undoubtedly aware what was necessary to be done to execute the instrument, produced by him, as a valid will of real and personal estate. It does not distinctly appear whether the testator's name was signed to the will in the presence of Jones, who was the first witness, or had been previously signed to it. But that it was actually there, when Jones attested the will, is evident from his testimony. For he says that the testator, putting his finger on the signature and seal, declared that he acknowledged the instrument as his hand and seal, for the uses and purposes therein mentioned. Jones then subscribed his name as a witness, in the presence of the testator. The other two witnesses came in while Jones was there, and he thinks they also signed their names, as witnesses, in his presence. Jones, who was examined some ten years after the transaction, and when he was about seventy-seven years old, thinks he did not know, at the time the instrument was executed, that it was a will; nor until a year or two afterwards, when the testator told the witness he wished to remind him that he was a witness to his will. That the witness is under a mistake in supposing he did not know that it was the testator's will, at the time it was executed, is evident from the testimony of Robinson, the coachman; the last attesting witness. For he says Jones and Apps were both present when he witnessed it; although he did not see them sign their names, as their names and the name of the testator were there before he came into the room. But he says that when he attested it in their presence, the testator put a pen into his hand, and acknowledged and declared the instrument to be *his will*; and requested him to sign his name

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thereto as a subscribing witness, and he did so in the testator's presence. The testator at the same time remarked, that James Apps, one of the witnesses, was going to England, and would be handy to prove the will there, in case it should be necessary. The recollection of James Apps, the groom, appears to be still more indistinct than that of Jones, as to the particulars of the transaction; for he does not remember that any other person than Mr. Jauncey was in the room while he was there. But he does recollect, and testify, that some one told him Mr. Jauncey wanted him in the parlor, that he went up, and he believes that the testator asked him if he was James, and he said yes; that the testator then pointed to a paper on the table, and requested him to sign his name to it as a witness, under that of Jones, and he did so, in the testator's presence; and he believes the testator told him, before he left the parlor, that the paper was his will. He also says the testator observed that he understood the witness, was going to England, and if so he would be handy to prove his signature there, as he probably might be wanted for that business in England. Although this witness does not recollect the fact, I have no doubt, from his testimony and that of the other two witnesses, in connection with the circumstances to which I have before referred, that the same formality of acknowledgment was gone through with, when Apps was asked to witness the will, as when Jones and Robinson witnessed it; and that, at the time they attested the instrument, all the subscribing witnesses understood it was the testator's will which they were attesting by their signatures; and that the testator intended to admit that he had signed, sealed, and published it as such.

The sentence and decree of the surrogate, admitting the will to probate, and to be recorded as a valid will of real estate, and the order of the circuit judge of the first circuit, affirming such sentence, must, therefore, be affirmed, with costs.

KNICKERBACKER *vs.* BRINTNALL.

No affidavit of merits is necessary, under the 91st rule, on an appeal from a decree of a vice chancellor in a mortgage case, where such decree was in favor of the defendant.

THIS was an appeal from the decision of a vice chancellor, in a mortgage case, which decision was in favor of the defendant. And the cause was on the calendar for argument, in the fourth class. No affidavit of merits having been filed by the defendant,

J. D. Willard, for the complainant, moved that the cause be taken up out of its order; claiming that it was entitled to a preference, under the 91st rule.

The CHANCELLOR decided that the 91st rule only applied to appeal cases, when the decision appealed from was against the defendant, and not to cases where the decision was in his favor; that in cases of the latter kind there was no presumption that the appeal was brought for delay.

Motion denied.

DUMONT and others *vs.* NICHOLSON and others.

It is irregular to insert fractions of a cent in a master's report.

THIS was a motion for a decree, in a mortgage case, upon a master's report showing that the sum of \$190,22 $\frac{1}{2}$ was due to the complainant.

J. Rhoades, for complainants.

The CHANCELLOR said that the statute required all computations to be in dollars and cents; and that it was therefore

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irregular to insert fractions of a cent in a master's report. And he directed the $\frac{1}{3}$ d of a cent to be stricken out, and that the decree be entered for the balance only, in dollars and cents.

LYNDE vs. LYNDE.

Where a bill is filed by the husband against his wife for a divorce, on the ground of adultery, and the adultery is denied on oath, the court has the power to direct the husband to pay her a specified sum for her travelling expenses, and board, if it is shown that her health is such as to render it apparently necessary, for the preservation of her life, that she should spend the winter in a milder climate.

THE bill in this case was filed by the husband, against his wife, for a divorce, upon a charge of adultery. The defendant denied the charge, upon oath, and an issue was awarded to try the question; and an allowance was made to the wife for the expenses of the suit and for *ad interim* alimony. The complainant having neglected to bring on the issue to be tried, the defendant, upon the affidavits of her attending physicians, showing that her health was such that the safety of her life required that she should spend the winter months either in the West Indies or in the southern states, and upon hearing counsel for the complainant, the vice chancellor ordered a gross sum of \$400, to be paid to her immediately, for the expenses of her journey and board for four months; and that her former allowance for *ad interim* alimony should in the mean time be suspended. The income of the husband was about \$2000 a year. The complainant appealed from that order, and

A. Taber, for the appellant, insisted that the court was not authorized to make an allowance to the wife for that purpose.

E. Sandford, for the respondent, urged that the allowance was proper; and that the sum allowed was no more than the

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necessary expenses for board and passage money would be, without allowing any thing for clothing in the meantime.

The CHANCELLOR affirmed the order with costs.

GERARD vs. GERARD.

Where a decree has been taken against a defendant, for want of appearance, after a personal service of the subpœna, the court is authorized to impose such terms as it thinks proper, upon the defendant, as a condition of opening the decree.

Therefore it may require the husband, in a suit against him, by his wife, for a divorce, to give security for the payment of *ad interim* alimony to her, *pendente lite*, as well as an allowance for the necessary expenses of her suit.

But if the bill is taken as confessed against the defendant as an absentee, without an actual service of the subpœna, the court has no right to require payment, or security for the payment, of any thing beyond the necessary costs and expenses of the suit, as a condition of letting him in to defend; provided he makes his application within the time prescribed by the statute.

The order, directing a reference to a master to inquire and report as to *ad interim* alimony, during the pendency of a suit for a divorce, should direct that, upon the coming in and confirmation of the master's report, the husband pay to the wife the sum allowed by the master for alimony, and payable as directed by the report. Without a previous order of the court, directing a husband to pay the amount to be allowed for alimony, he cannot be brought into contempt for not paying the alimony fixed by the master.

THIS was an appeal from an order of the vice chancellor of the third-circuit. The complainant filed her bill to obtain a divorce, for the alleged adultery of the defendant, and obtained a decree by default. The defendant, who was a resident of New Hampshire at the time of his application, obtained an order opening the decree and the order to take the bill as confessed, and allowing him to put in an answer, denying the adultery, upon payment of all the costs which had then accrued in the suit. And it was referred to a master to report a suitable allowance to the wife for *ad interim* alimony, and for the expenses of the future litigation. The defendant paid the costs and

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put in his answer, denying the adultery charged in the bill, and the complainant's solicitor filed a replication to the answer. Some months afterwards the master made his report. And upon an affidavit that the allowance, reported by the master, had been demanded of the defendant's solicitor, and had not been paid, and that the defendant was an absentee, the vice chancellor directed the answer of the defendant to be taken off the files, and that the former decree for a divorce should be restored, unless the allowance for alimony and for the expenses of the suit should be paid within a specified time.

E. A. Doolittle, for the appellant.

M. T. Reynolds, for the respondent.

THE CHANCELLOR. The order appealed from is erroneous, and must be reversed. If the decree was taken against the defendant, for want of appearance, after a personal service of the subpoena, the vice chancellor was authorized to impose such terms as he pleased upon the defendant, as a condition of granting him the relief asked; and might have required him to give security for the payment of *ad interim* alimony, to the wife, pendente lite, and also for an allowance for the necessary expenses of her suit. But if the bill was taken as confessed against him as an absentee, without an actual service of the subpoena, the court had no right to require payment, or security for the payment, of any thing beyond the necessary costs and expenses of the suit, as a condition of letting him in to defend; provided he made his application within the time prescribed by the statute. (*See 2 R. S. 187, §§ 133, 178.*)

In this case, however, the defendant obtained an order opening the decree, and allowing him to come in and defend the suit, upon payment of the costs which had then accrued; which was the only condition then required of him. For although the reference, as to *ad interim* alimony, and an allowance for the expenses of future litigation, was directed by the same order, the payment of the amount which should be allowed, by

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the master; was not made a condition of opening the decree and permitting the defendant to answer the complainant's bill. The defendant, by the payment of the costs which had then accrued, and the putting in of his answer denying the charge of adultery, had therefore acquired the right to have the question of his guilt or innocence tried by a jury, before a divorce could be granted; even if he was subsequently guilty of a contempt, for neglecting to pay the amount allowed, by the master, for alimony and for the expenses of the suit.

It is even doubtful whether the defendant was in contempt, in this case, for not paying the allowance for alimony, &c. specified in the master's report. For it does not appear, by the papers on this appeal, that there had been any order made by the vice chancellor, for the payment of the sum which should be allowed by the master. In drawing the order for such a reference, the solicitor for the wife should make it a part of the order, that upon the coming in and confirmation of the master's report, the husband pay to her the amount of her *ad interim* alimony, and the allowance for the prosecution or defence of the suit, at the times and in the manner specified by the master in his report; so that after the report has been confirmed, by the usual order nisi in the master's office, the husband will be bound to pay such allowance, without the expense and delay of a further order directing him to pay the amount fixed by the master.

Order of the vice chancellor reversed.

HARRINGTON and wife vs. BECKER and others.

Where a suit abates by the death of some of the defendants, before decree, the proper course for the survivors, if they wish to speed the cause, is to move for an order that the complainant revive the suit within such time as shall be directed by the court, or that his bill be dismissed with costs.

Where a suit abates by the death of one of the original defendants, and a third party subsequently acquires the interest of the deceased party, by purchase from his heirs before the revival of the suit against such heirs, the suit must be revived, by a bill of revivor and supplement, against the purchaser.

Harrington v. Becker.

THIS was an application by J. Crary, one of the defendants, to dismiss the bill for want of prosecution. The bill was filed, against the widow and heirs of the owner of the equity of redemption in the mortgaged premises, and against Crary, to foreclose a mortgage. Subsequent to the commencement of the suit, and after the cause was in readiness to take testimony as to some of the defendants, the widow of the former owner of the equity of redemption died; and one of his children also died. After those events, the other children, who were the heirs at law of the deceased child, conveyed the whole of their interest in the mortgaged premises to a stranger.

M. Fairchild, for the defendant Crary.

C. F. Ingalls, for the complainants.

THE CHANCELLOR. The death of the widow alone would not have deprived the defendant Crary of the right to dismiss for want of prosecution; for all her interest terminated with her life, and the cause of suit survived against the other defendants. But by the death of one of the children, who was a tenant in common, in fee, of the equity of redemption, with the others, the suit abated as to his share; which would have rendered it necessary to revive the suit against the other children, as the heirs at law of the deceased child, although they were already parties to the suit as to their own shares of the equity of redemption. An order to dismiss, therefore, would have been improper, in that situation of the suit, even if the surviving children had not subsequently conveyed all their interest in the premises to a third person, as purchaser. The proper course for a defendant, who wishes to speed the cause, in such a case, where the suit abates before decree, is to move for an order that the complainants revive the suit, within such time as shall be directed by the court, or that their bill be dismissed with costs.

Here the suit has not only abated as to one of the original defendants, whose interest survived to his heirs, but a third

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party has subsequently acquired that interest, from such heirs, as well as the rights of all the original defendants, except Crary, in the premises. The suit must, therefore, be revived by a bill of revivor and supplement, against such purchaser.

The motion to dismiss for want of prosecution must be denied. But under the clause of the notice asking for such relief as the party may be entitled to, an order must be granted requiring the complainants to cause the suit to be duly revived, against such purchaser, within ninety days, or that their bill be dismissed, with costs, as against the defendant Crary; unless the purchaser prevents the revival within that time, by getting the usual time to answer the bill of revivor and supplement extended.

HARTSON vs. DAVENPORT.

If a mortgage is usurious, and is a cloud upon the title of the mortgagor, he has a right, under the act of 1837, to come into the court of chancery for the purpose of having the mortgage cancelled. But that will not entitle him to an injunction, to prevent the mortgagee from trying the question of usury, before a jury, in a suit at law upon the bond; unless a discovery is necessary, or some other obstacle exists to the making of the defence at law.

Where a party, by a slip, has lost the opportunity to set up a mere technical or unconscientious defence, and comes to the court for a favor, which it is necessary should be granted to enable him to set up such a defence, the court of chancery will require him to do equity, as a condition of granting the favor asked.

THIS was an appeal, from an order of the vice chancellor of the seventh circuit, allowing the complainant to amend his bill. The object of the bill was to have a bond and mortgage, which were alleged to be usurious, given up and cancelled. And the bill contained a prayer for an injunction, restraining the defendant from proceeding in a suit at law upon the bond. It appeared from the bill that the complainant had conveyed a small portion of the mortgaged premises to another person; and the defendant demurred to the bill on the ground that

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such person was not made a party. The complainant thereupon applied for leave to amend his bill, by making such purchaser of a part of the premises a party to the suit. The vice chancellor allowed the amendment, upon payment of the costs of the demurrer, and the costs of opposing the motion.

R. B. Van Valkenburgh, for the appellant, insisted that as it was an injunction bill, and showed upon its face that the purchaser of a part of the premises was a necessary party, he should have been made a party in the first place. He also insisted that as the object of the bill was to set aside and cancel a mortgage, as being usurious, the complainant should not be permitted to amend his bill upon any other terms than that of paying the amount loaned, with legal interest thereon.

J. A. Collier, for the respondent, was stopped by the court.

The CHANCELLOR said, that although an injunction was prayed for, it was evident that no injunction could properly be granted, on this bill, to restrain the suit at law upon the bond; that the bill, if true, showed that the complainant had a perfect defence at law, and no discovery was asked for; and that, in such cases, this court should never interfere by injunction to stay the suit which had been commenced at law, upon the bond, and to compel the plaintiff in that suit to come into this court to litigate the question of usury. He said, however, that if the mortgage was usurious, and was a cloud upon the title of the complainant, the latter had a right, under the provisions of the act of 1837, to come into this court for the purpose of having the mortgage cancelled; but that would not entitle him to come here for an injunction, to prevent his adversary from trying the question of usury before a jury, in the suit at law upon the bond; unless a discovery was necessary, or some other obstacle existed to the making of the defence there.

In reference to the terms upon which the vice chancellor had allowed the complainant to amend, the chancellor said that the decision appealed from was right; that where a party, by a

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lip, had lost the opportunity to set up a mere technical or unconscientious defence, and came to the court for a favor, which it was necessary should be granted to enable him to set up such defence, the court would require him to do equity, as a condition of granting the favor asked; that, in this case, however, the refusal of the amendment would not deprive the complainant of the power to get rid of the usurious security, but would merely subject him to the useless expense of filing a new bill, without any benefit whatever to the adverse party.

The order appealed from was, therefore, affirmed, with costs.

SILLICK and others vs. MASON.

Where a person is entitled, under a will, to an annuity for life, payable semi-annually, out of the income of real and personal estate in the hands of trustees, his interest in such annuity, beyond what is necessary for the support of himself and his family, may, under the provisions of the revised statutes, be reached by a creditor's bill, and applied to the payment of his debts.

THIS was an appeal from an order of the vice chancellor of the first circuit, founded upon exceptions to a master's report. The complainants were judgment creditors of the defendant, who under his father's will was entitled to an annuity of two thousand five hundred dollars for life, payable semi-annually out of the income of real and personal estate in the hands of trustees. On the day upon which a semi-annual payment of the annuity became due, and before it was received by the defendant, the complainants, whose execution had been returned unsatisfied, filed their bill in this cause to reach the defendant's interest in the annuity, and obtained the usual injunction restraining him from receiving, collecting, or intermeddling with his property, either in his own hands, or held in trust for him. The defendant moved to dissolve or modify the injunction. And the vice chancellor refused to dissolve it. But he referred

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it to a master to ascertain and report what was a reasonable amount per annum for the support of the defendant and his family; and directed that upon the coming in and confirmation of his report the injunction should be modified, so as to enjoin and restrain the defendant only as to so much of the annuity, payable to him under his father's will, as should exceed the amount which was necessary for the reasonable maintenance and support of the defendant and his family. The master reported that the whole annuity of two thousand five hundred dollars per annum was a reasonable amount for that purpose; although it appeared that the defendant had no children, and had no other family than himself and wife. But it also appeared, by the evidence before the master, that the defendant had never been brought up to any business; and that he had lived in his father's family, and entertained the idea that a fortune would be provided for him, so as to render it unnecessary that he should follow any business pursuits. The vice chancellor modified the report of the master, so as to allow to the defendant only fifteen hundred dollars a year, for the support of himself and his wife, and modified the injunction only so far as to permit the defendant to receive and use seven hundred and fifty dollars of the half year's annuity which became due and payable on the day of the filing of the complainants' bill. From this last order the defendant appealed.

G. R. J. Bowdoin, for the appellant.

Julius Rhoades, for the respondents.

THE CHANCELLOR. The question cannot arise, upon this appeal, whether the annuity is one which can be reached by a creditor's bill, even if it is not all necessary for the support of the defendant and his family. That question was settled upon the original motion to dissolve the injunction, and the order made upon that application was not appealed from. I have no doubt, however, that under the provisions of the revised statutes on that subject, the interest of the cestui que trust in such

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a trust as this, beyond what may be necessary for the support of himself and his family, may be reached; by a creditor's bill, and applied to the payment of his debts. (*See 1 R. S. 725, § 57; Idem, 773, § 2; and Clute v. Boul, 8 Paige's Rep. 83.*) The only question in this case, therefore, is whether the master came to the right conclusion in supposing that the whole annuity of two thousand five hundred dollars was no more than a reasonable allowance, for the support of the defendant and his wife, under the circumstances appearing in the evidence before the master upon the reference.

It certainly was the misfortune of the defendant that he was brought up in idleness, under the idea that he was to inherit a large estate, and that it was unnecessary that he should acquire any business habits so as to fit him to acquire property, or to enable him to take care of it if given to him by others. It was proper therefore for the master to take that circumstance into account, in deciding what would be a reasonable allowance for support and maintenance. For no one can suppose that a person who has been brought up with improvident habits, and without having learned how to take care of property, will be able to live comfortably upon the same amount which would enable an industrious, provident, business man to support himself and family respectably as well as comfortably. And this, I apprehend, is the difference between the defendant's situation and that of the witnesses, who were examined before the master, on the part of the complainants. Still, I think the master erred in supposing that the whole annuity was necessary for the support of the defendant and his wife, while they both remained well and were not subjected to any extraordinary expenses. I think also, the vice chancellor restricted the allowance too much. Two thousand dollars would enable them to live respectably in New-York, according to their condition in life, even if the defendant should not think proper to do any thing for his own support. And they should not, upon a fair construction of the statute on this subject, be permitted to indulge in extravagant expenditures while the defendant's creditors remain unpaid.

The New-York Life Ins. and Trust Co. v. Smith.

The fact that the complainant's debt was contracted for the clothing of the defendant and his wife, can make no difference as to the rights of the parties. For the law knows no difference between one honest debt and another. And the judgment creditor is entitled to the same relief, against the surplus of the trust fund, whether his debt is for a tailor's bill, for cash lent, or for property sold. It is imprudent, in either case, to trust a man who earns nothing for himself, and who has no property except that which is placed beyond the reach of his creditors by an inalienable trust, and who is not in the habit of paying the debts he contracts, from time to time, upon the credit of the income of this trust property, when he receives such income.

The order of the vice chancellor which is appealed from must be so modified as to allow the defendant to receive and use one thousand dollars, of the half year's annuity which was due upon the day of filing of the bill in this cause, and one thousand dollars of each half year's annuity which may hereafter accrue and become payable, until the further order of the court; and the order is in all other respects affirmed. The costs of the complainant upon this appeal are to abide the event of the suit.(a)

(a) See *Bryan v. Knickerbacker*, (1 Barb. Ch. Rep. 409.)

THE NEW-YORK LIFE INSURANCE AND TRUST COMPANY vs.
SMITH and others.

The mere recording of the assignment of a mortgage, is not of itself legal notice to the mortgagor, of such assignment; so as to invalidate a payment, made by him, or his heirs, or representatives, to the assignor.

The recording of the assignment of a mortgage is only constructive notice of such assignment, as against persons claiming by virtue of some subsequent assignment or conveyance from the mortgagee, or assignor of the mortgage, or his representatives.

THIS was an application by the defendant Smith, to open a decree which had been duly entered and enrolled, and to let

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him in to defend the suit. The bill was filed to foreclose a mortgage, given to W. Smith by J. Hebard, upon a lot in Chautauque county, in March, 1833; which lot was then owned by the mortgagor, but was conveyed by him to the defendant C. Smith, with warranty, in March, 1836. The mortgage was duly recorded soon after its date; and in November, 1834, the bond and mortgage were assigned by the mortgagee to J. Lovell, and such assignment was duly recorded on the second of December thereafter. Lovell having died, his executors, as the guardians of his infant children, assigned the bond and mortgage to the complainants; which assignment was also duly recorded. In September, 1846, the bill in this cause was filed, to foreclose the mortgage, and the subpoena was personally served upon the defendant C. Smith, and wife; but the mortgagee being an absentee, and irresponsible, the complainants subsequently dismissed their bill as to him. Immediately after the service of the subpoena, the defendant Smith instituted an inquiry, and learned that the mortgage had been assigned to Lovell, and that the assignment had been recorded; and he was also informed by Hebard, the mortgagor, that the latter had paid the whole amount of such mortgage to the mortgagee, in 1836, and without notice of the assignment. But being advised by counsel, with whom he then consulted, that he had no defence to the suit, and relying upon the promise of W. Smith, the mortgagor, that he would cause the matter to be settled, he made no defence, and did not enter his appearance in the suit. The bill was, therefore, taken as confessed, against him and his wife, about the first of December, 1841. In May, 1842, a final decree for the foreclosure and sale of the mortgaged premises, to pay the amount of the mortgage with interest and costs, was entered; and in June, in the same year, the premises were advertised for sale, by the master, under the decree. About the last of July or the first of August, 1842, the defendant, upon consulting other counsel, was advised that he had a good defence to the suit; and on the first of October thereafter he sent notice by mail, to the complainant's solicitor, of an application, to be made on the third Tues-

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day of the same month, to discharge the enrolment and open the decree, and to set aside the order taking the bill as confessed, and all subsequent proceedings, and to permit the defendants to come in and make a defence to the suit.

J. Rhoades, for the defendants.

W. Betts, for the complainants.

THE CHANCELLOR. There is no doubt that the facts stated in the defendant's petition, if proved, would have constituted a good defence to this suit. For by express provision of the revised statutes, the recording of the assignment of a mortgage is not of itself to be deemed notice of such assignment to the mortgagor, so as to invalidate any payment made by him, or his heirs or representatives, to the mortgagee. (1 R. S. 763, § 41.) The recording of the assignment of a mortgage is only constructive notice, of such assignment, as against persons claiming by virtue of some subsequent assignment or conveyance from the mortgagee, or assignor of the mortgage, or his representatives. (a) If this application, therefore, had been made immediately after the defendant was informed of the alleged improper and wrongful act of the mortgagee, in receiving payment of the debt after he had sold and assigned all his interest in the bond and mortgage to Lovell, it would have been almost a matter of course to open the order to take the bill as confessed, and to let the defendants in to defend.

It appears by the petition, however, that the defendant C.

(a) *James v. Morey*, (2 Cowen, 246.) *Reed v. Marble*, (10 Paige, 409.) These decisions go upon the principle that there is no statute requiring assignments of mortgages to be recorded, and making such recording constructive notice to the mortgagor. (See *James v. Morey*, *supra*.) And in *Williams v. Birbeck*, (1 Hoff. Ch. Rep. 359,) it was held that no one is chargeable with constructive notice of an instrument from its being recorded; unless the law makes it necessary to record it. It has also been decided in Alabama, that the registration of a deed or other writing, is not notice to the world of its contents, unless made so by statute. (*Baker v. Washington*, 5 Stew. & Port. 142. *Tatum v. Young*, 1 Porter, 298.) And a similar decision has been made in Maryland. (*Cheney v. Watkins*, 1 Har. & John. 527.) In *Roberts vs. Jackson*, (1 Wend. 485,) Savage, Ch. J. says the recording

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Smith was fully apprized of every fact which he now wishes to set up a defence to this suit, nearly a year before this application was made, and that he intentionally neglected to appear and defend the suit ; because the counsel then employed by him advised him that these facts constituted no defence. But he does not state who such counsel were, or that they are irresponsible. Nor is their affidavit produced, showing or explaining how such advice happened to be given ; not only in opposition to the settled rule of the common law on that subject, but also in the face of a positive provision of the revised statutes.

Besides ; the neglect of the defendants to set up the defence at the time the facts first came to their knowledge, has probably deprived the infant wards of the complainant, for whose benefit this suit is brought, of their remedy against the assignor of the mortgage ; to recover back the money which he received to the use of their father, the assignee. For if an answer had been put in, setting up this defence, in the fall of 1841, or the winter subsequent thereto, it would not have been too late for the executors of Lovell to recover back the \$600, which the mortgagee had received, to the use of the assignee, in the spring of 1836. But by waiting till the fall of 1842, before they apprized the complainants of this alleged defence of a payment to the mortgagee, the claim against the latter, in favor of the executor, was probably barred by the statute of limitations. These defendants having relied upon the promise of W. Smith to have the matter arranged, and having concealed from the complainants the knowledge of the fact that the mortgagee had

of an assignment of a mortgage is not necessary to its validity ; but that it may be recorded, and that its execution may be proved in the same way as a mortgage. In *Williams v. Birbeck*, *supra*, the assistant vice chancellor expresses the opinion that since the adoption of the revised statutes, an assignment of a mortgage must be recorded, to protect the assignee against a subsequent assignment of the mortgage, without notice.

Notice by the recording acts is not retrospective, so as to affect existing, vested rights. (*Stuyvesant v. Hone*, 1 *Sand. Ch. Rep.* 419.) And the recording of a deed or mortgage, is not notice of its existence, to a prior mortgagee. (*Idem.*) It is the duty of a subsequent purchaser, or incumbrancer, to give to such mortgagee, actual notice of his rights, in order to affect the latter. (*Idem.*)

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received the money due upon the mortgage, until the remedy of the executors of Lovell against W. Smith was endangered, if not absolutely barred, I think the infant wards of the complainants ought not to sustain the loss. The petitioners must, therefore, be left to seek their remedy against W. Smith, upon his promise to them, or against the counsel whose erroneous advice prevented them from making their defence when it should have been made, if the allegations in their petition are correct.

As Hebard, the mortgagor, had parted with all his interest in the mortgaged premises, he was not a necessary party. And being an absentee and without property, it would have been useless to continue the suit against him. The bill was therefore properly dismissed as to Hebard. The petition must therefore be denied with \$10 costs, to be paid by C. Smith

 STAGG, executor, &c. vs. JACKSON and wife.

[Affirmed, 1 N. Y. 203. Applied, 5 Redf. 460.]

The surrogate, in whose office a will is proved, has jurisdiction to call an executor to account for the proceeds of real estate sold by such executor, under a power contained in the will, and for the rents and profits of such real estate received by him, previous to the sale thereof, under and by virtue of a power in the will of the testator.

Where a will directs real and personal estate to be sold by the executors, and makes but one fund of the real and personal property of the testator, for the purposes of the will, neither the executors, nor the estate, should be subjected to the expense of taking two accounts of the same fund, or of different parts thereof; one before the surrogate, and the other in the court of chancery.

In such a case, the provisions of the revised statutes are sufficiently broad to authorize the surrogate to take jurisdiction of the whole matter, and to compel an account by the executors, both as to the personal estate, and the rents and proceeds of the sale of the real estate of the testator, and to decree the payment, to the residuary legatees, of their respective shares.

A contingent limitation over, to other persons, of the capital of shares given to minor children on their arriving respectively at the age of twenty-one, in case the minor presumptively entitled to the same shall die under age, without leaving issue, forms no objection to the jurisdiction of the surrogate to decree an account and

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settlement of the estate, upon the application of a legatee, and to direct the immediate payment of the share of such legatee, who has become absolutely entitled to the same.

The fact that the shares of minors are held by the executors, in trust, until they shall respectively become of age, only suspends the power of the surrogate to decree a distribution and payment of those shares of the estate, to the legatees, until such minors shall respectively arrive at the age of twenty-one, or die.

The court of chancery being authorized by statute, upon the affirmance of a decree of a surrogate, to award damages to the respondent for the delay and vexation caused by the appeal, it is proper that such damages should be awarded to the respondent in all cases, where he has been delayed by the appeal, and where it is evident that damages have been sustained in consequence thereof.

Where the appeal is from a final decree directing the payment of money, interest on the amount decreed to be paid, during the time the collection of the money has been suspended by the appeal, is the proper measure of damages to be awarded to the respondent.

THIS was an appeal, by the executor of the last will and testament of A. Stagg deceased, from the sentence or decree of the late surrogate of the city and county of New-York. By the will of the testator, who died in 1835, he devised and bequeathed all his estate, real and personal, to his executors, in trust to sell the same, and until such sale, to receive the rents, profits and income thereof, for the purposes of his will, and upon the following trusts: *First.* To invest the proceeds of the real and personal estate, and to pay out of the same \$50 a year for the education and support of his daughter Helena, until she should attain the age of fifteen years, over and above her distributive share of the estate, and the like sum for the education and support of his son Junius Theodore, until he should attain the same age, over and above his distributive share of the estate and the income thereof. *Secondly.* To divide the trust fund and the income thereof, subject to those charges thereon, into nine equal parts, and to pay over and convey one part thereof to his daughter Anna Matilda Earl and her heirs, one equal part to his daughter Mary Elizabeth and her heirs, and one equal part to John T., the appellant, and his heirs; to hold one other part thereof in trust for his daughter Hannah Augusta Gautier; and to hold the remaining five parts thereof in equal shares for his other five children who were then minors

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as in the next clause of his will mentioned. *Thirdly.* To hold the shares of such minor children respectively until they should arrive at lawful age, and then to pay over the same to them or their heirs or assigns; and during the minority of each to pay so much of the income of his or her share, for his or her support and education, as the executors should think proper. And he directed that if either of his said minor children should die under age, and without leaving lawful issue, his or her share should then go to, and be divided among the testator's surviving children, and the issue of such of his children as should have died leaving children.

The appellant took upon himself the burthen of the execution of the will, and received the rents and profits of the real estate until he sold the land, and then received the proceeds of such sale. In 1843, the testator's daughter Mary Elizabeth, who had then intermarried with James Jackson, joined with her husband in a petition to the surrogate, praying that the executor might be compelled to account, and also to pay over to her and to the other parties interested in the estate of the decedent, their respective shares thereof. Upon the return of the citation, the executor rendered an account of the personal estate only; showing a balance in his hands of about \$3000. The petitioners objected to various items in the account of the personal estate, and also that the executor had not charged himself with interest upon the moneys remaining in his hands from time to time. They also alleged, that at the time of the death of the testator, he was seised of real estate, which the executor had since sold under the power contained in the will, and that until the time of such sale, the executor received the rents of the said real estate; but that neither the proceeds of such sales, nor the rents and profits of the real estate previous to such sale, had been accounted for by him. The executor insisted upon the correctness of his account as to the personal estate of the decedent; and he denied the jurisdiction of the surrogate to call him to an account for the rents and profits, or the proceeds of the sales, of the real estate. He therefore demurred to that part of the claim of the petitioners.

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The surrogate, after hearing the case argued by the advocates of the parties, pronounced a sentence, or decree, overruling the demurrer of the executor, and directing that the executor proceed with the further accounting in relation to the estate of the decedent; that he produce the vouchers for the debts and credits in his account theretofore rendered, and exhibiting the particulars thereof; that he also account for the rents and profits of the real estate of which the testator died seised, as well as for the proceeds of the real estate, received by him upon the sale thereof; and that he file his account, duly verified, with the vouchers, in the office of the surrogate, on or before the 15th of December, 1843, and submit himself to examination on oath as to the payments made by him, and as to any property or effects of the decedent which had come to his hands, and as to the disposition thereof; or in default of compliance with such sentence and decree, that an attachment issue against such executor. And the question as to the liability of the executor for interest was reserved until such further accounting was had.

The executor thereupon appealed from the whole of such sentence and decree, except the part thereof which related to the personal estate of the decedent which was proper to be included in the inventory of personal estate.

S. Miller, for appellant. The surrogate had no power to make such an order as is appealed from. The statute confines him, in decreeing distribution, to the personal estate of the testator contained in the inventory, except where a legacy or debt is ordered to be paid from the sales of real estate. Such legacy must be certain, to give him jurisdiction, and not contingent. He has no power other than what the statute expressly gives him. (2 *R. S.* 109, § 57. 6 *Cowen*, 221. 1 *Hill*, 130. 2 *Wend.* 689.) By his will, the testator devises his real estate on certain trusts and limitations; and the effect is to render such devises uncertain, and the amount of interest neither a specific legacy nor a legacy of any kind; but the whole is a

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trust, over which the surrogate has no control, and the same must be adjudicated by a court of equity.

L. B. Woodruff, for respondent. By the provisions of this will the entire property of the testator, real and personal, was blended in one common fund; real estate to be converted into money, and the whole, together with the income thereof, applied to the payment of debts and legacies, and to be divided among his children. This amounted to a conversion of the real estate into personalty, at the death of the testator, upon the doctrine of equitable conversion. (*Ram on Assets*, 139, [205,] and cases cited.) Where a will creates a trust to sell real estate, and the testator's object is to cause a conversion, for the purposes of the will, a legacy which was void under the statute of George, passed to the residuary legatee of personalty. So as to lapsed legacies. (See 2 *Pow. on Devises*, p. 60, and onward; *Leigh & Dalzel on Eq. Conv.* 5 *Law Lib.* 1st series; *Marsh v. Wheeler*, 2 *Edw. Ch. Rep.* 157; *Lorillard v. Coster*, 5 *Paige*, 218; *Bunce v. Vander Grift*, 8 *Id.* 37.) It is a general principle that money directed to be employed in the purchase of land, or land directed to be sold and converted into money, is, for all the purposes of the will, considered as that species of property into which it is to be converted. This would be true, even if there had been no devise of the legal estate, but only a power to sell and lease, and to pay debts and legacies, &c. (See cases cited above.) In accordance with the above principles, which apply in equity to the whole estate before it is actually converted into money, the rents and profits, when collected, and the proceeds of sales actually made, are legal assets in the hands of the executor. And so the vice chancellor of the first circuit expressly decided, in the case of this appellant, (*Stagg, ex'r, v. Celle and others*,) in reference to this identical will and the estate held under it, adjudging it, after actual conversion, to be personal estate, to be distributed according to the statute of distributions. The powers conferred by the will appertain to John T. Stagg in his representative character—i. e. as executor. Devise to executor for payment of debts, and

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until debts are paid, gives a chattel interest which goes to the executor as executor; and this is so even if a power only was given to the executor, the freehold meantime descending to the heir. When sold, the assets would be held by the executor as executor. And upon the principle that whatever goes to the executor as executor is legal assets, the proceeds are in both cases deemed legal assets in his hands. (1 *Atk.* 484. 1 *P. Wms.* 430. *Hard*, 405. 1 *Vern.* 63. 2 *Id.* 106, 248, 405. *Proc. Ch.* 127, 136.)

Real estate once converted into money by an executor, pursuant to the direction of the will, for the payment of debts, legacies, and distribution, is not only legal and personal assets in his hands, but is to be accounted for before the surrogate. The statute is explicit in regard to proceeds of sales. (2 *R. S.* p. 49, [109, 10,] §§ 55, 57.) There is no foundation for any distinction between the rents collected before the sale, and the moneys received on the sale. The whole are the result of the conversion contemplated by the will. And upon the above principle the rents (as much as the proceeds of sale,) are, when collected, legal and personal assets. And if so, the surrogate has, unquestionably, jurisdiction to compel an account. (See *Bogert v. Hertell*, 4 *Hill*, 192.) His accounting therefore must be as executor. (See *Toller on Ex'rs*, 413 and onward.)

S. Miller, in reply. In order to give the surrogate jurisdiction, in this case, it was incumbent on the respondents to show, that by the will of the testator a sale of real estate was ordered to be made, either for the payment of debts or legacies. And even if such a state of facts were shown, the power of the surrogate extended only to compel the executor to account for the proceeds of sales, and to compel distribution thereof; and he had no right to compel him to account for the rents and profits of the real estate of which the testator died seised. In no view of the case can this portion of the decree be sustained. Was it then shown, in the present case, that by the will in question a sale of real estate was ordered to be made, either for the payment of debts or legacies, or more properly

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speaking, for the payment of legacies ; for it is this branch of the surrogate's jurisdiction which the respondents in the present case have invoked.

None of the provisions of the will order the real estate to be sold for the payment of a legacy to the respondents. The relation in which the parties stand is that of trustee and cestui que trust, and not that of executor and legatee. The will gives the executor authority, in the exercise of his discretion, to sell or lease the whole or part of the real estate ; but nowhere orders him to do it. It constitutes and treats him throughout as a trustee. Nor do the cases referred to by the counsel for the respondents, establish the principle, that real estate, when converted into money, becomes equitable personal assets, and will, in a court of equity, be treated as such. The parties are not contending in a court of equity, whose powers are co-extensive with the whole trusts created by the will, and whose decree can discharge the trustee from the obligations which they impose ; but before a court having a statutory jurisdiction, whose powers are limited to the precise terms of the statute, and whose decree, upon a mere matter of trust, can afford no protection to the executor, or, more properly speaking, the trustee. Nor does the respondent, Mrs. Jackson, stand in the attitude of a legatee of a specific sum to be produced by a sale of the real estate. It depends upon the discretion of the trustee, whether she is to receive her share, either in whole or in part, in the form of a division of the real estate, or in its income from leases, or in money. And though it may turn out that, by the action of the executor, she may be entitled to it, all in money, still, so far as the jurisdiction of the surrogate is concerned—a jurisdiction purely legal, and partaking of none of the characteristics of a court of equity—she is to be regarded not as a legatee, but as a cestui que trust.

Again : By the terms and conditions of the will, the executor is to hold the real estate in trust, &c. ; and to receive the rents, issues and profits thereof, for the benefit of the devisees until sold. Now, he so held the real estate, for a number of years before the sale was made, and has received large amounts

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of rents, as well as the avails of such sales. It will not, nor can it, be contended, that the surrogate can govern or direct the application of these rents, as he has assumed to do by the decree appealed from. He has no power over them; and it would be useless to divide a part and separate the rents from the amount received from the sales. Such a discrepancy and partial power and settlement will never be countenanced, and is within no fair interpretation of the statute.

The whole question is one of jurisdiction, and the executor would not be protected by the adjudication of a tribunal having no power over the subject in controversy.

THE CHANCELLOR. The only question which arises upon this appeal, is whether the surrogate's court had jurisdiction and authority to call this executor to account for the proceeds of the real estate sold by the latter, under the power contained in the will, and for the rents and profits of such real estate received by him before such sale, under and by virtue of the power given to him, as such executor, by the will of the decedent. And upon this question I do not see that there are any reasonable grounds for doubt.

The will in this case directs the real estate to be sold, and makes but one fund of the real and personal property of the testator, for the purposes of the will; and the trust to receive the rents and profits of the real estate, by the executor, until sales of such real estate can be made, is a mere incident to the direction to convert the real estate into personalty for the purposes of the will. There is no reason, therefore, why the executor, or the estate, should be subjected to the expense of taking two accounts of the same fund, or of different parts thereof; one before the surrogate, and the other in the court of chancery. And the provisions of the revised statutes are sufficiently broad to authorize the surrogate to take jurisdiction of the whole matter, so far as the interests of these respondents are concerned, to take the account of the whole estate, both real and personal, which has come to the hands of the appellant as executor, and to decree payment to Mrs. Jackson of the

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ninth part of the proceeds of the real and personal estate, to which she is entitled as one of the residuary legatees, and which, by the terms of the will, she is entitled to immediately. The surrogate has power to compel the executor to render an account of his proceedings, upon the application of a person having a demand against the personal estate of the decedent, as a legatee. (2 R. S. 92, §§ 52, 55.) He has also jurisdiction, upon the application of a legatee, to decree payment of a legacy. (2 R. S. 116, §§ 18, 19, *sub.* 2. *Idem*, 90, §§ 45, 48.) And where, by will, the sale of real property is ordered to be made, either for the payment of debts or legacies, the surrogate in whose office the will was proved, has power to cite the executor to account for the proceeds of such sales, and to compel distribution thereof, and to make all necessary orders and decrees therein, with the like power of enforcing them, as if such proceeds had originally been personal property in the hands of an administrator. (2 R. S. 110, § 57, 61.)

In the present case, Mrs. Jackson is a legatee, within the true intent and meaning of these several statutory provisions, not only of one-ninth of the residuary personal estate, but also of one-ninth of the proceeds of the sales of the real estate, and of the rents and profits thereof, which the executor was authorized to receive for the immediate use of some of the residuary legatees, and in trust for some others of them, either generally or temporarily. The executor should therefore have paid the debts, funeral charges, and expenses of administration, out of the estate, and should have set apart a sufficient fund, out of the estate, to purchase the two annuities, of \$50 each, for Helena and Junius Theodore, until they respectively arrived at the age of fifteen. He then should have added to the residue of the proceeds of the real and personal estate, including the rents and profits and interest and income thereof, the two advancements of \$120, which the testator had made to his daughters Mrs. Earl and Mrs. Gautier, and which by the will was directed to be added to their shares in the distribution. And if the distribution was not made at the expiration of one year after the testator's death, the executor should have charged interest on

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such advances from the expiration of the year ; so as to make the interest equal among all the residuary legatees. One-ninth of the distributive fund, as thus ascertained, would belong to himself, another ninth he should immediately have paid over to Mrs. Jackson, and another, less the advance of \$120 and the interest after the expiration of the year, should have been immediately paid over to Mrs. Earl, and another ninth, less the advancement and interest, he should have kept and invested, in trust for Mrs. Gautier, as directed by the will. The remaining five-ninths of the estate he should have divided into five equal parts, and invested one part for each of the minor children until they attained the age of twenty-one respectively ; and he should have accumulated the income thereof for their benefit, if it was not wanted for their education and support.

The contingent limitations over of the capital of these five shares, to the surviving children or their issue, in case the minors presumptively entitled to the same should die under age, without leaving issue, formed no objection to the jurisdiction of the surrogate to decree an account and settlement of the estate, upon the application of the respondents ; and to direct the immediate payment of the one-ninth of the residuary estate to which Mrs. Jackson was entitled absolutely. And the fact that the shares of these minors were held by the executor in trust, until they respectively should become of age, only suspended the power of the surrogate to decree a distribution and payment of those portions of the estate, to the legatees, until such minors respectively arrived at the age of twenty-one, or died ; when it would be ascertained to whom that part of the capital of the estate belonged. The interest or income of the shares of these minors, beyond what was necessary for their support, belonged to them absolutely, until it could be ascertained to whom the capital of those shares would ultimately belong. For as there can be no valid direction for the accumulation of rents, or income, except for the benefit of a minor in being when the accumulation commences, if either of the minors should die under twenty-one, the accumulation of income which had been made for his use in the meantime, would belong to his next of kin

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or legatees. For the minor himself, if he should die under age, would be absolutely entitled to such accumulated income at the time of his death, as the person presumptively entitled to the next eventual estate, in the capital of the fund, at the time the income thereof accrued. (1 R. S. 726, § 40. *Idem*, 773, § 2.)

The surrogate was clearly right in the sentence and decree which he made, directing the appellant to account for the rents and profits and proceeds of the real estate, as well as the personal effects of the testator. The decretal order must therefore be affirmed with costs. The statute also authorizes this court, upon the affirmance of the decree of a surrogate, to award damages to the respondent, for the delay and vexation caused by such appeal. (2 R. S. 618, §§ 35, 42.) And it is proper that such damages should be awarded to the respondent in all cases, where such respondent has been delayed by the appeal, and where it is evident that damages have been sustained in consequence thereof. Where the appeal is from a final decree awarding the payment of money, the interest on the amount decreed to be paid, during the time the collection of the money is suspended by the appeal, is the proper rule of damages. But as this appeal suspended the proceedings before the account was taken, the damages which the respondents have sustained, by the appeal, is the interest on the balance which was due to them from the executor at the time the appeal was entered; including in such balance such interest as the appellants were then entitled to, upon their share of the funds in the hands of the executor, from the time when he ought to have paid it over to them, or invested it for their use. The decree of affirmance must therefore direct, that the respondents recover against the appellant the interest on the balance which was due to them, from the executor, for principal and interest, on the 23d of December, 1843, the time of entering the appeal, as their damages for the vexation and delay caused by this appeal. For the purpose of ascertaining, and giving to the respondent such damages, the decree must direct the surrogate to state the account, with a rest on the day upon which such appeal was entered

In the matter of Lasher.

And he must charge the executor with interest, from that time, upon the balance which was then due from him, to the respondents, for the principal and interest with which he was then chargeable, for their share of the proceeds of the real and personal estate of the decedent, and of the rents, interest, and income thereof.

In the matter of CATHARINE LASHER, a lunatic.

The court of chancery has the power, in the exercise of a sound discretion, to direct the issuing of a new commission of lunacy, where, from the evidence, or otherwise, there is no doubt that the jury must have erred in finding that the party proceeded against was not of unsound mind.

THIS was an application for a new commission of lunacy, to enquire as to the soundness of mind of C. Lasher. A commission had been issued, and executed, in which the jury found she was not a lunatic. But the commissioners all certified that, from the testimony adduced on the execution of the commission, as well as upon personal examination and inspection, they had no doubt she was a lunatic and of unsound mind, so as to be incapable of governing herself or managing property. They also returned all the evidence taken before them and the jury. And one of the commissioners, who was a physician, stated that he had also examined her privately and apart from all other persons, and that from the examination thus made it was manifest to him that she was a lunatic.

T. B. Mitchell, for the petitioner.

THE CHANCELLOR. There is no irregularity, or defective finding of the jury in this case. And the only questions for consideration are whether the court has the power to award a new commission; and if so, whether this is a proper case for the exercise of the power.

In the matter of Lasher.

In the case *Ex parte Glen*, (4 Dess. Rep. 546,) the court of chancery in South Carolina refused an application for a new commission, to enquire of the lunacy, upon the merits. But it appears to have been taken for granted that the court had the power to direct a new commission to be issued, in a proper case, although the jury had decided in favor of the competency of the alleged lunatic, and there had been no irregularity upon the execution of the commission. Shelford says that where a regular return is made, if there is sufficient evidence in the case to satisfy the chancellor that the party is a proper subject for a commission, a new commission will be directed to issue. And in the case of *Donegal*, (2 Ves. sen. 408,) Lord Hardwicke remarked that in Lord Wenman's case no less than three commissions were applied for before he was found *non compos mentis*. I have no doubt, therefore, that the court has the power, in the exercise of a sound discretion, to direct the issuing of a new commission, where from the evidence or otherwise, there is no doubt that the jury must have erred in finding that the party proceeded against was not of unsound mind.

In this case, in addition to the unanimous opinion of the commissioners that Mrs. Lasher is a lunatic, they have returned all the testimony which was before the jury upon the execution of the commission. And from an examination of that testimony there does not appear to be any room to doubt that this lady now is, and for several months has been, afflicted with mental derangement, so as to be incompetent to govern herself or to manage her estate.

A new commission must therefore issue, to enquire whether she is a lunatic, or of unsound mind; directed to the same commissioners

BEDELL vs. BEDELL.

After a defendant has obtained a chamber order from a vice chancellor granting him further time to answer, he cannot put in a demurrer to the bill, without special leave of the court.

But this principle does not apply to a case of the extension of the time by the voluntary stipulation of the complainant's solicitor.

If, however, under a stipulation extending the time to answer, a defendant puts in a demurrer which is clearly frivolous, it will be taken from the files.

THIS was an application on the part of the complainant to take the demurrer, filed by the defendant, off the files of the court, with the costs of the motion; and for such other or further order or relief as the court should think proper to grant. The bill stated that the complainant and defendant were joint owners of a schooner, engaged in the transportation of passengers and freight between New-York and Norfolk, under the charge of the defendant. The bill charged that the defendant had received all the net earnings of the schooner since the first of December, 1843, amounting to several thousand dollars, and that he had not accounted for the same, or any part thereof, to the complainant; and that he was continuing to receive and apply the whole profits and earnings of the schooner to his own use. The complainant therefore prayed for an account of the profits and earnings of the schooner, and that the defendant might be decreed to pay him his share of the same, and for such other relief as the complainant was entitled to upon the case made by the bill. The complainant also prayed for an injunction and receiver.

The bill was served upon the defendant's solicitor on the 18th of June, 1846, with a notice of an order that the defendant answer the same within forty days, or that the bill should be taken as confessed. On the last day allowed by the order for answering the bill, the defendant's solicitor obtained a stipulation, from the adverse party, giving to the defendant forty days further time to answer the complainant's bill. And two or three days after the expiration of the said extended time, the defendant's solicitor filed a general demurrer to the bill, for want

Bedell v. Bedell.

of equity, and sent a copy to the complainant's solicitor; who thereupon gave notice that he would not accept of a demurrer.

O. L. Barbour, for the complainant.

J. Rhoades, for the defendant.

THE CHANCELLOR It is settled that the defendant cannot put in a demurrer to a bill without special leave, after he has obtained a chamber order from a vice chancellor giving time to answer. (*Burrall v. Raineteaux*, 2 *Paige's Rep.* 331.) I am not aware, however, that this principle has ever been applied to the case of the extension of the time by the voluntary stipulation of the complainant's solicitor. Nor is it necessary that the principle should be thus applied. For the party who agrees to extend the time, may always prevent the putting in of a demurrer after the time is thus extended, if he wishes to do so, by making it a part of the stipulation that the defendant shall not demur to the bill. And if the defendant, after applying for and accepting such a stipulation, for further time to answer merely, should put in a demurrer to the bill, it would be a matter of course for the court, upon a proper application for that purpose, to order the demurrer to be taken off the files.

In the present case, the demurrer would be permitted to stand, although it was put in after the obtaining a general stipulation, for further time to answer the bill, without restriction, if it was not so manifestly frivolous. But as the demurrer is clearly frivolous, it was not only an abuse of the indulgence which had been granted to the defendant, by the complainant's solicitor, in allowing him further time to answer the bill, but it was also an abuse of the practice of the court to put such a demurrer upon its files.

The motion to take the demurrer from the files must therefore be granted, with ten dollars costs.

PARTRIDGE *vs.* MENCK and others.

[Affirmed, 3 Den. 610; How. Cas. 547.]

The court of chancery has the power to interfere, by injunction, to prevent the pirating of trade-marks.

The question, in such cases, is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, nor whether the article made and sold by the defendant, under the complainant's trade-mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business; and that having appropriated to himself a particular label, or sign, or trade-mark, indicating that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends, or customers, or of the patrons of his trade or business, by using his trade-mark without his authority or consent.

Where there is a doubt as to whether the complainant's trade-mark has been actually pirated, in such a manner as to be likely to deceive and impose upon his customers, or patrons, the court will not grant or retain an injunction until the cause is heard upon pleadings and proofs, or until the complainant has established his right by an action at law.

But where the court sees that the complainant's trade-marks are simulated in such a manner as probably to deceive his customers, or patrons, the piracy will be checked at once, by injunction.

THIS was an appeal from an order of the vice chancellor of the first circuit, dissolving an injunction. (a) A. Golsh was formerly the maker and vender of a particular kind of friction or loco foco matches, in the city of New-York; which matches he put up in small brown paper boxes, with a moveable cover, of the same material, covering about one third of the box from the top downwards. And he used a label, which was pasted upon one side of the box, containing, among other things, the printed words, "A. GOLSH'S FRICTION MATCHES," and a wood cut representing a bee-hive; which were his trade-marks. He subsequently sold out to the complainant, and T. White; and gave to them the privilege of using his trade-mark or label. White subsequently sold his interest in the business to the complainant, who continued the business of making and vending the same kind of matches. Some of his matches were put up

(a) See 2 Sand. Ch. Rep. 622, S. C.

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and labelled in the same manner, and others were put up in the same form except as to the label, and the manner in which it was placed upon the boxes. The defendants Menck & Backes subsequently commenced the manufacture and sale of a similar kind of matches, which were put up in the same manner in brown paper boxes, with a cover. And a label was also pasted on one side of each box, containing, among other things, the printed words, "A. Golsh," and a wood cut representing a bee-hive. The use of such labels, as the defendant charged in his bill, was a pirating of his trade-marks; and was intended to deceive purchasers, and to induce them to believe that the matches so put up and sold by the defendants, Menck & Backes, were the genuine *Golsh Matches* made and sold by the complainant. The other defendant was engaged in the sale of the matches of Menck & Backes, and was for that reason made a party. The defendants by their answer denied that their label was a pirating of the trade-marks of the complainant, or that it was intended to induce purchasers to believe that the matches sold by them were the matches manufactured by Golsh, or by the complainant as his assignee. But they stated that the defendant Backes had been the chemist of A. Golsh, while the latter was engaged in the manufacture and sale of matches; which fact was stated on their labels. And they insisted that the matches manufactured and sold by them were made in the same manner as those made by Golsh, and afterwards by the complainant, and were equally good.

S. M. Woodruff & M. T. Reynolds, for the complainant.

Edward Sandford, for the respondents.

THE CHANCELLOR. Since the decision of this court in the case of *Taylor v. Carpenter*, (11 *Paige's Rep.*) (b), and which

(b) Subsequent to the filing of the bill in this court, in the case of *Taylor v. Carpenter*, a suit between the same parties, was instituted in the circuit court of the United States in Massachusetts, on the equity side of the court. Judge Story decreed a perpetual injunction, with costs. *Taylor and others v. Carpenter*, Nov. 1844.

Partridge v. Menck.

decision was recently affirmed by the court for the correction of errors, there is no doubt of the power of the court of chancery to interfere, by injunction, to prevent the pirating of trade-marks. The question in such cases is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, nor whether the article made and sold by the defendant, under the complainant's trade-mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business; and that having appropriated to himself a particular label, or sign, or trade-mark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends, or customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent.

In many cases it may be difficult to determine whether the complainant's sign, or trade-mark, has been actually pirated in such a manner as to be likely to deceive and impose upon his customers, or the patrons of his manufacture, trade or business. And in cases of doubt the court should not grant or sustain an injunction, until the cause is heard upon pleadings and proofs, or until the complainant has established his right by an action at law. But if the court sees that the complainant's trade-marks are simulated, in such a manner as probably to deceive his customers, or the patrons of his trade or business, the piracy should be checked at once, by injunction. In this case, however, I am not satisfied that the label used by the defendants will probably have the effect to deceive and impose upon those who are in the habit of buying and using the matches made and sold by the complainant; by inducing them to believe the matches of these defendants are of his manufacture.

(7 *Law Reports*, 437.) This case is said to be defectively reported, however. (See 9 *Sand. Ch. Rep.* 596.)

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I do not find it distinctly charged, in the complainant's bill, that he had been in the use of his second label before Menck & Backes assumed the use of their label. But even if there was such a charge, there is about as much difference between that label and the one now used by the defendants, as there is between their's and the complainant's first label, which was originally used by Golsh; except as to the form and appearance of the bee-hive. One difference between the original, or Golsh label, and the label of the defendants, is, that all the printed words and figures, on the Golsh label, are in black letters upon a white ground, while those on the defendants' label are in white letters upon a black ground. The Golsh label is also shorter than the defendants'; only reaching upwards upon the box to the bottom of the cover, and leaving the whole printed part of the label, above the bee-hive, containing the words "A. GOLSH'S friction MATCHES" distinctly visible below the cover of the box. But the printing on the defendants' labels runs up under the cover of the boxes, leaving nothing visible above the bee-hive except the printed words "LATE CHEMIST FOR A. GOLSH." And the names of the streets and avenues, and the numbers of the buildings at which the matches are made, at the bottom of these two labels, are entirely different. So that without removing the covers from the boxes, the words upon the two labels strike the eye at once as being entirely dissimilar. And if the covers are removed, for the purpose of seeing the parts of the labels which are under them, or to look at the matches, nothing will be found upon the Golsh label concealed by the cover of the box. But upon the upper part of the defendants' label, will be found the words "Menck & Backes Friction Matches, made by J. Backes," printed in small caps. Again; the bee-hive upon the Golsh label is so badly made that it is necessary to look at the cut some time to discover what it was intended for. But that upon the defendants' label is an elegantly constructed device, which no one who had ever seen an old fashioned straw bee-hive, in the days of his boyhood, could for a moment suppose was intended to represent any thing else. Indeed the differ

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ence, in appearance, between these two labels is so great, even while the covers remain upon the boxes, that it is hardly possible to believe that a person who had been in the habit of buying, and using, boxes of matches with the Golsh label would suppose those with the defendants' label were the same article, from any resemblances in the different labels.

It is not necessary that I should notice all the differences in appearance between the defendants' label and the second label of the complainant. It is sufficient to say that the word "GOLSH" does not appear upon the complainant's second label, below the cover of the box; and that the only words upon that label, below such cover and above the bee-hive, are "MATCHES without sulphur." But neither of these words appears upon the defendants' label below the cover; and the two last words are not to be found upon any part of their label. The only real resemblance between the complainant's second label and the defendants' label, either with or without removing the covers from the boxes, is in the bee-hives, and in the black ground upon which the words and figures of the labels appear.

The vice chancellor was, therefore, right in refusing to retain the injunction. And the order appealed from must be affirmed, with costs.(c)

(c) See *Coats v. Holbrook*, (2 Sand. Ch. Rep. 586;) cases referred to in note, (*Id.* 499;) and *Spottiswoode v. Clarke*, (*Id.* 628.) See also *Snowden v. Noah*, *Hopk. Ch. Rep.* 347;) *Bell v. Locke*, (8 Paige, 75;) *Seely v. Fisher*, (11 Sim. 581;) and *Motley v. Downman*, (3 My. & Craig, 1.)

*SPEAR vs. TINKHAM.

Vice chancellors have no jurisdiction to hear appeals from surrogates, in any case. And an order of the chancellor, referring an appeal of that nature to a vice chancellor, will not confer any jurisdiction upon the latter.

Whitbeck v. Edgar.

THIS was an appeal to the chancellor from a decree of the surrogate of the county of Ontario. And was placed upon the calendar, in the fourth class, to be argued *ex parte*.

J. Rhoades, for appellant, moved that the appeal be referred to the vice chancellor of the 7th circuit for hearing and decision. He insisted that 2 R. S. 98, §§ 6, 7, authorized a reference, in a case of this kind.

The CHANCELLOR said the vice chancellor had no jurisdiction to hear appeals from surrogates, in any case, under the provisions of the revised statutes. And that an order of the chancellor, referring an appeal of that nature to a vice chancellor, would not confer any jurisdiction upon the latter.

Motion denied.

WHITBECK vs. EDGAR and others.

Who may file a cross-bill.

A defendant cannot demur to a bill, for the misjoinder of other persons as co-defendants.

A demurrer to the whole bill does not lie merely because the prayer for relief is too broad. The proper course, in such a case, is to demur to the part of the relief, specifically prayed for, to which the complainant is not entitled, upon the case made by his bill.

THIS was an appeal from an order of the late vice chancellor of the first circuit, overruling a demurrer, of the defendant Edgar, to the complainant's bill.

A. L. Robertson & J. Rhoades, for appellant, *ex parte*.

The CHANCELLOR said that although it was a general rule that a cross-bill could not be filed by any persons except parties to the original suit, yet that a purchaser, *pendente lite*, from a

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party to the suit, was a privy, and might file a bill, in the nature of a cross-bill, to make himself a party to the suit so as to have his rights protected.

He also held that a defendant could not demur to a bill merely because other persons were improperly made defendants in the suit. He said the objection could only be taken by those persons themselves. Neither could a defendant demur to the whole bill on the ground that the complainant asked for too much; that if the prayer for relief was broader than the facts of the case warranted, the defendant should demur to the part of the relief asked for to which the complainant was not entitled.

 SNEDIKER vs. PEARSON.

A party is not entitled to an injunction to stay proceedings, in a suit at law, upon an award, on the ground that the award was obtained by the fraud and corruption of the arbitrators, or that there never was any submission to them as arbitrators.

The defendant, in such a case, has a perfect defence at law to the suit upon the alleged award.

It is irregular to issue a general injunction ex parte, upon a supplemental bill, which injunction is to affect the rights of a defendant who has appeared in the original suit, by a solicitor.

The solicitor of the defendant who has appeared in the suit, is entitled to notice of the application for an injunction, upon a supplemental bill filed in such suit.

THIS was an appeal from an order of the late vice chancellor of the first circuit, denying the defendant's application to set aside an injunction for irregularity. The complainant filed his original bill to wind up the affairs of a copartnership, and to restrain further proceedings by the defendant in a court of law. The defendant set up as a defence, that the matters in difference had been submitted to arbitration by the parties, and that the arbitrators had made their award, in pursuance of such submission. The defendant having afterwards obtained

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ced a suit upon the award, the complainant applied to the vice chancellor, ex parte, for leave to file a supplemental bill. And upon filing such bill, containing a general allegation that the award was corruptly, fraudulently, and illegally made, and that the defendant had commenced such suit at law thereon, the vice chancellor granted an ex parte injunction to restrain proceedings in the suit at law. The injunction, however, contained the usual clause, allowing the plaintiff in the suit at law to proceed to judgment.

R. F. Winslow, for the appellant.

N. Hill, Junior, for the respondent.

THE CHANCELLOR. The vice chancellor erred in allowing an injunction in this case; even if it was regular to allow it ex parte, after the defendant had appeared in the suit by a solicitor. For if the allegation in the supplemental bill was true that the award was obtained by the fraud and corruption of the arbitrators, or that there never was any submission to them as arbitrators, of the matters in difference between the parties, the complainant had a perfect defence at law to the suit upon the alleged award. And for that reason he was not entitled to an injunction to stay the proceedings in that suit, either before or after judgment.

The question for consideration here, however, is whether the issuing of the injunction without notice to the defendant was regular. The course to be pursued to obtain an injunction, upon a supplemental bill, which injunction is to affect the rights of a defendant who has appeared to the original bill by a solicitor, is pointed out in the case of *Bloomfield v. Snowden*, (2 *Paige's Rep.* 356.) It was there settled that it was irregular to issue a general injunction, ex parte, to continue until the defendant moved to dissolve the same, against a party who had appeared in the suit by a solicitor; and that he was entitled to notice of the application. According to the decision in that case, the injunction issued upon this supplemental bill was ir-

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regular. There was no necessity, even for a temporary injunction, to restrain the defendant from proceeding until he could have a chance to be heard upon a regular notice of the application. The vice chancellor therefore should have set aside the injunction, as irregularly issued.

The order appealed from must be reversed, with costs. And the injunction must be set aside as irregularly issued, with the costs of the motion; which costs must be inserted and taxed in the *same* bill with the defendant's costs on this appeal.

DE PEYSTER *vs.* HILDRETH and others.

S. & W. H. executed a bond and mortgage, to the complainants. At the time of the giving thereof, S. S. & Co. were the holders of a judgment against the mortgagors, which was a lien upon the mortgaged premises, and upon other real estate of the mortgagors. An execution had been issued upon that judgment, and levied upon a store of goods. The complainant had notice of that judgment. Subsequently to the execution of the mortgage to the complainant, S. S. & Co. issued a second execution upon their judgment, and made an arrangement with the defendants therein by which they withdrew the first execution from the hands of the sheriff. The result of this arrangement was to give other executions, then in the hands of the sheriff, a preferable lien upon the personal property of the mortgagors, and to subject their real estate, upon a part of which the complainant's mortgage was a lien, to liability for the amount due on that judgment. The agent of S. S. & Co., after leaving their second execution dormant in the hands of the sheriff for about fifteen months, caused the mortgaged premises to be advertised and sold thereon, and purchased them, in the name, and for the benefit, of S. S. & Co. Previous to that sale, the complainant had filed his bill in this cause to foreclose his mortgage, making S. S. & Co. parties. And he had obtained a regular decree, which gave his mortgage a preference over their judgment; they having neglected to appear in the cause. The mortgaged premises were advertised to be sold under that decree, on the 30th of July, 1846; previous to which time S. S. & Co. applied to the chancellor to open their default, and the decree, and for leave to them to appear, and put in an answer. The chancellor took time to consider the application; and in the meantime he directed the master to proceed and sell the premises according to the directions in the decree. The master sold the mortgaged premises on the 12th of September, 1846, and they were bid in by the complainant, and were conveyed to him: and the report of the sale was duly confirmed. On the 6th of October, 1846, the chancellor denied the

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application of S. S. & Co., without reserving to them any right to renew it. On the 1st day of February, 1847, S. S. & Co. applied to the court for leave to renew their motion to open their default, and the decree of foreclosure in this cause; or that the complainant might be decreed to redeem their judgment. After the decision of the chancellor upon the first application, and before notice was given of the second, the complainant sold and conveyed a portion of the premises purchased by him at the master's sale, to T. A. L. The complainant, in his affidavit in opposition to the second application, stated that he believed it was the intention of S. S. & Co. to cast a cloud upon his title by taking a conveyance from the sheriff upon the sale under their judgment. He therefore asked for an order, on the foot of the decree, restraining them from doing so.

Held, 1. That the court was not authorized, upon this application, to make an order to restrain S. S. & Co from taking a sheriff's deed upon the sale under their judgment. That if any relief of that kind was necessary, the proper remedy of the complainant was to file a bill against S. S. & Co., after they should have taken such deed, to remove the cloud thus cast upon the title.

2. That the recording of the master's deed was constructive notice to all subsequent purchasers, from any of the parties to the decree, that the rights which such parties had in, or the liens which they had upon, the mortgaged premises, at the time of the decree, were cut off by the master's sale.
3. That no court, in the exercise of a sound discretion, should set aside a regular decree of foreclosure and sale, for the mere purpose of giving to a defendant a nominal priority in payment out of the proceeds of the sale of the mortgaged premises, where it appears that the cash value of the property is such that it is wholly immaterial which party is entitled to priority.
4. That it is out of the usual course of practice to make an application for the same relief, a second time, where the first motion or petition has been denied, upon the merits, without reserving to the applicant the right to renew his application.
5. That S. S. & Co. had not used due diligence, in making their renewed application, after they had notice of the decision against them upon the first.
6. That it was inequitable, as to the complainant, for S. S. & Co. to consent to withdraw the first execution from the hands of the sheriff, so as to discharge the personal estate which the defendants in the judgment had at the time of issuing that execution, and to leave their judgment to be satisfied out of the real estate which had previously been mortgaged to the complainant.
7. That the complainant's equity, to be paid out of the proceeds of the mortgaged premises, was greater than that of S. S. & Co.; who had lost the opportunity to have their judgment satisfied out of other property of their judgment debtors, by their own acts, and by their negligence. And that the complainant having obtained a decree, whereby he has secured to himself the legal right to priority of payment, the court ought not to interfere to deprive him of it.

THIS was an application, on the part of the defendants Suydam, Sage & Co., who were judgment creditors of the mortgagors, S. & W. Hildreth, to renew a motion to open the order

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taking the complainant's bill as confessed against them and the decree of foreclosure in this cause; or that the complainant might be decreed to redeem their judgment which was a lien upon the mortgaged premises. At the time of the giving of the complainant's bond and mortgage, which was for money lent, Suydam, Sage & Co. were the assignees of a judgment against the mortgagors; and against two other persons who were the principal debtors, and primarily liable for the payment of that judgment. The judgment was at that time also a lien upon other real estate, of the defendants therein. And an execution had also been issued thereon, upon which the sheriff had levied on a store of goods. But Suydam, Sage & Co. had a mortgage, given by S. & W. Hildreth, to secure acceptances which had before been made, as well as acceptances thereafter to be made for them; which mortgage was a lien upon some of the other real estate of the Hildreths, subsequent to the judgment, but prior to the date of the complainant's mortgage. The complainant's attorney, at the time of the giving of the mortgage to him, was aware of the existence of the judgment. But being informed that the execution thereon had already been levied upon property sufficient to satisfy it, without resorting to the mortgaged premises, and that it was only kept on foot for the purpose of obtaining satisfaction out of the property of the other two defendants therein, who were primarily liable for its payment, the whole amount of the loan was paid over to the Hildreths, and applied to the payment of debts due to Suydam, Sage & Co. and others; leaving that judgment unsatisfied on record. About six months after the giving of the complainant's mortgage, Suydam, Sage & Co. caused a second execution to be issued, upon the judgment assigned to them; and an arrangement was subsequently made between them and the defendants in that judgment, by which the execution, which had previously been issued and levied upon the store of goods, was withdrawn from the hands of the sheriff. The result of this arrangement was to give other executions, then in the hands of the sheriff, a preferable lien upon the personal property of the Hildreths, and to subject their real estate, upon a part

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of which the complainant's mortgage was, to liability for the amount due on that judgment. And the agent of Suydam, Sage & Co., after leaving their second execution dormant in the hands of the sheriff for about fifteen months, caused the mortgaged premises to be advertised and sold upon that execution, and purchased them, in the names, and for the benefit, of Suydam, Sage & Co. Previous to that sale, the complainant had filed his bill in this cause to foreclose his mortgage, making the owners of that judgment parties. And he had obtained a regular decree, which gave his mortgage a preference over their judgment; they having, through inadvertence, neglected to employ a solicitor to appear and protect their claim to a preference in payment out of the proceeds of the sale of the mortgaged premises. The mortgaged premises were advertised to be sold, under the decree in this cause, on the 30th of July, 1846; previous to which day, Suydam, Sage & Co. applied to the chancellor, ex parte, and obtained an order for the complainant to show cause, on the first Tuesday of August, why their default and the decree should not be opened, and they be permitted to appear and put in an answer; and that in the meantime the sale be stayed. Upon the hearing of that motion, the chancellor took time to consider the same. And in the meantime he directed the master to proceed and sell the premises according to the directions contained in the decree; the complainant's counsel having stipulated to pay the amount due upon the judgment, out of the proceeds of the sale, in case that application should be decided in favor of the petitioners, Suydam, Sage & Co. The master proceeded and sold the mortgaged premises, on the 12th of September thereafter, and the same were bid in by the complainant for \$8000; leaving due to him upon his mortgage about \$9600. The premises were conveyed to the complainant accordingly, and the report of the sale was duly confirmed. On the first Tuesday of October, the chancellor denied the application of Suydam, Sage & Co., without reserving to them any right to renew it. The order thereon was entered the 26th of the same month; and on the 12th of November was served upon the agent of the solicitor for the

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petitioners. On the 16th of January, 1847, notice of the present application was served, for the first day of the January term ; but was subsequently countermanded, and was re-served for the second Monday in term. After the decision of the chancellor upon the petition of July, 1846, and before the complainant had any intimation of an intention on the part of the petitioners to renew the motion, he sold and conveyed a considerable portion of the premises, purchased by him at the master's sale, to T. A. Lawrence ; and received a conveyance of other lands in part payment of the purchase money, and a bond and mortgage in full for the residue thereof. The complainant, in his affidavits in opposition to the motion of Suydam, Sage & Co., stated that he believed it was their intention to cast a cloud upon his title by taking a conveyance from the sheriff, upon the sale of the premises under their judgments. And his counsel asked for an order, on the foot of the decree, restraining them from taking such sheriff's deed.

D. Greig, for Suydam, Sage & Co.

H. F. Clark, for the complainant.

THE CHANCELLOR. The court is not authorized, upon this application, to make an order to restrain the petitioners from taking a sheriff's deed upon the sale under their judgment. If any relief of that kind is necessary, the proper remedy of the complainant will be to file a bill against them, after they shall have taken such sheriff's deed, to remove the cloud which they have cast upon his title. Had the complainant's bill been in the usual form, stating that Suydam, Sage & Co. had or claimed some interest in the mortgaged premises, as purchasers, mortgagees, or otherwise, which interests, if any, had accrued subsequent to the complainant's mortgage and were subject thereto, the taking of the sheriff's deed might cast a cloud upon the title of the purchaser under the decree. For the plaintiffs in the judgment not being parties to the foreclosure suit, and the fact that those who were made parties, and who became

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the purchasers at the sheriff's sale, were the assignees of the judgment, at the time of the decree, not being stated in the bill, it might not appear upon the face of the enrolled decree that the rights acquired by them, as purchasers at the sheriff's sale, were overreached and cut off by the decree, and by the master's sale made in pursuance of such decree. Here, however, it appears from the bill itself that the defendants Suydam, Sage & Co. were the assignees of the Cook judgment when this foreclosure suit was commenced. And the decree declares that the defendants in the suit, and all persons claiming under them, or any of them, subsequent to the commencement thereof, shall be barred of all equity of redemption or other claim to the premises sold by the master. The recording of the master's deed, therefore, is constructive notice to all subsequent purchasers, from any of the parties to the decree, that the rights which such parties had in, or the liens which they had upon, the mortgaged premises, at the time of the decree, were cut off and extinguished by the master's sale.

The affidavits on the part of these applicants, as to the value of the mortgaged premises, if they related to its actual value at the time of the master's sale, would of themselves be sufficient to defeat this application. For if the actual cash value was sufficient to pay both the judgment and the amount due upon the complainant's decree, the proper remedy of Suydam, Sage & Co. was to have attended the sale and bid up the property to a sum sufficient to pay the decree, and the amount of their bid at the sheriff's sale, with interest thereon. No court, in the exercise of a sound discretion, ever set aside a regular decree of foreclosure and sale, for the mere purpose of giving a defendant a nominal priority in payment, out of the proceeds of the sale of the mortgaged premises; when the papers on which his application was founded, showed that the cash value of the property was such that it was wholly immaterial which party was entitled to priority. It is true, these applicants cannot now obtain the property by paying the amount due to the complainant, with interest and costs. But no reason whatever is shown why they did not attend the sale and bid in the premises, if

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they really believed the value of the property was what they have gotten others to swear the premises are now worth, and thereby save the amount of their judgment and interest.

Again ; it is out of the usual course of practice to make the same application for relief a second time ; where the first motion or petition has been denied upon the merits, without reserving to the applicant the right to renew the same. That, however, would not have been an insuperable objection to the present motion, if the applicants had in fact made out a new case entitling them to relief. But they have not made use of due diligence, in making their renewed application, after they heard of the decision against them upon the first. The mortgaged premises were sold by the master as early as the 12th of September ; and the decision upon the former application was made early in October. The clerk of their own counsel swears he saw a statement of the decision published, and informed Mr. Sage of it, as soon as the first of November. And the order of the court was actually received by their solicitor on the 16th of that month. They had ample time, therefore, to renew their application on the first Tuesday of January. And, with reasonable diligence, they might have made their motion on the first Tuesday of December ; if they had attended to it immediately after they were informed of the decision. By their neglect to do so, a bona fide purchaser, who has not had notice of this application, has become the owner of about 200 acres of the mortgaged premises. And the decree and master's sale cannot now be opened without materially affecting his rights as such purchaser ; as the master's sale, which was entire, cannot be set aside in part, under the circumstances of this case. For these reasons, I should be obliged to deny this application, even if the merits of the case were with the applicants.

But there is nothing in the merits of the case, as now presented, to induce me to change the opinion which I expressed upon the former application. Indeed the papers now before me make out a much stronger case of equity in favor of the complainant's retaining the priority acquired by his decree, than was presented at that time. I am now satisfied that if Sny

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dam, Sage & Co. had proceeded with the execution which was in the hands of the sheriff, upon their judgment, at the time of the giving of the complainant's mortgage, the whole amount of that execution would have been realized by them, without resorting to the land mortgaged to the complainant; or to the land previously mortgaged to Suydam, Sage & Co., to secure their advances and acceptances for the Hildreths. They, too, were aware of the existence of the complainant's mortgage, and that his solicitor expected the judgment was to be paid out of other property, upon which it was a lien. Under such circumstances it was inequitable, as to the complainant, for them to consent to withdraw the execution from the hands of the sheriff; so as to discharge the personal estate which the defendants in the judgment had at the time of issuing that execution, and to leave their judgment to be satisfied out of the real estate which they knew had, before that time, been mortgaged to the complainant. That they were ignorant that an execution had been issued upon the assigned judgment, at the time they issued their second execution thereon, in August, 1844, might have been some excuse for the issuing of the last execution. But as they show that there was then no personal property which was not fully covered by other executions, there was no excuse for withdrawing the first execution, after they were aware of its existence; and thereby discharging the only personal property upon which either execution was a lien.

The complainant's equity to be paid out of the proceeds of the mortgaged premises, is therefore greater than that of Suydam, Sage & Co.; who have lost the opportunity to have their judgment satisfied, out of other property of their judgment debtors, by their own acts, and by their negligence. And the complainant having obtained a decree, whereby he has secured to himself the legal right to priority of payment, the court ought not to interfere to deprive him of it. (*Burchard v. Phillips and others*, 11 *Paige's Rep.* 66.).

This application must be denied with costs to be taxed.

EVERSON *vs.* HINDS and others.

A complainant took three exceptions to the defendant's answer, for impertinence, all of which were referred, and the master disallowed the first exception, and allowed the second and third. Neither party having excepted to the master's report, the usual order was entered to expunge the impertinent matter embraced in the second and third exceptions, and for the payment, by the defendant, of the costs of those exceptions. *Held* that the complainant was entitled to costs, of the two exceptions allowed, which had accrued previous to the entry of the order to refer the exceptions, and to the costs of the order to expunge the impertinent matter, and the costs of other proceedings upon the master's report subsequent to the filing of such report.

The costs, to which neither party is entitled, as against the other, upon a reference of exceptions, unless he finally succeeds as to all the exceptions referred, are the master's fees upon the reference, and the solicitor's and counsel fees, and other expenses between the perfecting of the exceptions and the filing of the master's report on the reference; including postages, and other disbursements.

THIS was an application by the defendant S. T. Hinds, for a retaxation of the complainant's costs upon exceptions to the defendant's answer for impertinence. The complainant took three exceptions to the answer; all of which were referred. The master disallowed the first exception, but reported that the second and third were well taken. Neither party excepted to the report; and the usual order was subsequently entered, to expunge the impertinent matter embraced in the second and third exceptions, and for the payment by the defendant Hinds, of the costs of those exceptions. Upon the taxation of the complainant's costs, under this order, the counsel for the defendant Hinds insisted that the complainant was not entitled to any costs upon the exceptions allowed by the master.

But the taxing officer allowed the costs of those two exceptions previous to the entry of the order to refer the same, and the costs of the order to expunge the impertinent matter, and the costs of the other proceedings upon the master's report subsequent to the filing of such report.

H. C. Van Schauck, for the complainant.

N. R. Chapman, for the defendant Hinds.

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THE CHANCELLOR. The order, under which the taxation took place, had directed the defendant Hinds to pay the complainant his costs upon the exceptions allowed by the master. And if the order was irregular, because the complainant was not entitled to any costs whatever, the proper remedy of the defendant was to apply to the court to set aside the order for irregularity. All that the taxing officer was authorized to decide, was how much of the costs of the exceptions, and of the proceedings thereon, were taxable under the provisions of the 63d rule of the court.

The order, however, was not irregular. For the rule provides that the party excepting shall have the costs of the exceptions which are submitted to, and of those which are finally allowed after reference to a master. Here the second and third exceptions were finally allowed after reference thereof to a master. The costs of drawing, perusing and signing, engrossing, copying filing, and serving those two exceptions, were therefore allowable under the express terms of the 63d rule. And the complainant was also entitled to the costs of the order to expunge the impertinent matter and the expenses of executing that order, and recovering his costs, under the provisions of the 57th rule; as a part of the necessary proceedings upon the second and third exceptions, after they had been finally allowed upon the reference.

The costs upon the reference, to which neither party is entitled, as against the other, unless he *finally* succeeds as to all the exceptions referred, are the master's fees upon the reference, and the solicitor's and counsel fees, and other expenses, between the perfecting of the exceptions and the filing of the master's report on the reference; including postages and other disbursements. All these have been excluded in the taxation of the complainant's bill; as I understand the case agreed upon by the parties. The taxation was therefore right; and it is unnecessary to consider the objection that a retaxation was not applied for within a reasonable time.

The motion for a retaxation must be denied, with \$7 costs

WARING *vs.* SMYTH and others.

Where the holder of a bond and mortgage, without authority from the mortgagor, altered the condition thereof in two very essential particulars, to the disadvantage of the mortgagor: and after the refusal of the latter to ratify the alteration, the mortgagee transferred the bond and mortgage to a third person, as valid and genuine securities, to secure the repayment of a loan of money to himself: *Held* that neither the assignee, nor any other person claiming title to the bond and mortgage through or under the person committing the fraud, as the assignee thereof, could enforce the collection of the mortgage, in a court of equity, against the mortgaged premises in the hands of the mortgagee, or of persons claiming title under him.

The modern rule is, that the alteration of a bond, or other sealed instrument, in a material part, if made by a party claiming to recover upon such instrument, or by any person under whom he claims, renders the deed void.

But an alteration by a stranger, without the privity or consent of the party interested, will not render the deed void, where the contents of the same, as it originally existed, can be ascertained.

The burthen of proof in such cases, however, is cast upon the party seeking to recover upon the deed, to show that the alteration was not made by him, nor by those under whom he claims, nor with his or their privity or consent.

A distinction is made between deeds which operate to convey the title to property, and those which merely give a right of action. For where the legal title to real estate passes to the grantee, by the execution and delivery of the deed, a fraudulent alteration of the deed by him will not have the effect to revest the title in the grantor; in those cases where the statute of frauds requires a written conveyance to transfer the title.

In this class of cases, the estate which was vested in the grantee, by a genuine and valid deed, remains in such grantee, although he destroys or makes void the deed itself, by a forgery, or by a voluntary cancellation of the deed which created that title. But the deed itself is avoided thereby, so that the grantee cannot recover upon the covenants therein, nor sustain any suit founded upon the deed itself as an existing and valid instrument.

Although the rule in England is that a mortgage in fee transfers the legal title to the land itself as a conditional fee, so that if the condition of the mortgage is not complied with, by the payment of the money at the day, a reconveyance is necessary to vest the title of the land in the owner of the equity of redemption, though the debt is subsequently paid; yet in this state the mortgagor is considered the real owner of the fee of the mortgaged premises, except for the mere purpose of protecting the mortgagee as the holder of a security thereon for the payment of his debt. And the only right the mortgagee has, in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid.

In this state, a mortgage is nothing but a chose in action; or a mere lien or security upon the mortgaged premises, as an incident to the debt itself. And where the mortgagee has released or discharged his debt, by an improper and voluntary alter-

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ation or destruction of the bond and mortgage by which it was secured, he ought not to be permitted to sustain a suit, in any court, for the recovery of his debt. (a)

THIS was an appeal from a decree of the late vice chancellor of the second circuit; allowing a demurrer, and dismissing the complainant's bill as to four of the defendants. The substance of the statements and charges in the bill was as follows:

Previous to the 10th of May, 1836, N. F. Waring had lent or advanced to Charles Smyth, \$3000; which the latter had promised to secure by a bond and mortgage upon lands in Jef-

(a) A material alteration of a deed or bond, after execution, avoids it. (*Miller v. Stewart*, 4 Wash. C. C. Rep. 26. *Commissioners v. Hannion*, 1 Nott & McC. 554. *Heffelfinger v. Shutz*, 16 Serg. & R. 44. *Lewis v. Payn*, 8 Cowen, 71. *Penny v. Corwith*, 18 John. 499. *Barrington v. Bank of Washington*, 14 Serg. & R. 424.) And it seems, from some of the authorities, that any alteration of an instrument, though immaterial, if made by the party claiming a benefit under it, avoids it, so far as respects remedy by action on it. (*Nunnery v. Colton*, 1 Hawks, 222. *Wright v. Wright*, 2 Halst. 175. *Lewis v. Payn*, 8 Cowen, 71. *Provost v. Gratz*, Pet. C. C. Rep. 369. *Morris v. Vanderen*, 1 Dal. 67. *Jackson v. Malin*, 15 John. 293. *Cutts v. United States*, 1 Gall. 71. *Pigott's case*, 11 Co. 27. *Hunt v. Adams*, 6 Mass. 519. And see *Griffith v. Cox*, Overt. Rep. 210. *Bank of Limestone v. Penick*, 5 Monroe, 31.) At all events, it is settled that if the instrument be altered in a material part, by the party claiming under it, he cannot recover on it. (*Newell v. Mayberry*, 3 Leigh, 250. *Mills v. Starr*, 2 Bailey, 359. *Martendale v. Follett*, 1 N. Hamp. Rep. 95. *Cutts v. United States*, 1 Gall. 71. *Hatch and wife v. Hatch*, 3 Mass. 307.) Thus, where, after the execution and delivery of an unattested bond, the obligee fraudulently, with a view to some improper advantage, and without the knowledge and assent of the obligor, procured a person who was not present, to put his name thereto as a subscribing witness, it was held that the obligor was thereby discharged. (*Adams v. Frye*, 3 Metc. Rep. 103. *Marshall v. Gougler*, 10 Serg. & R. 164. *Babb v. Clawson*, Id. 424.)

Yet an alteration which does not vary the meaning of an instrument does not avoid it, though made by the party claiming under it. (*Nichols v. Johnson*, 10 Conn. 192.)

[What is a material alteration.] If a bond be executed by B. as surety for A., to obtain an appeal from a justice's judgment, and the justice refuses to accept it, and afterwards, without B.'s knowledge, the name of C. is interlined, as an obligor, who executes the bond, and the justice then accepts it, it is void as to B. (*Oneale v. Long*, 4 Cranch, 60.) A bond to which a writing had been attached, which writing has been torn off, cannot be received in evidence after such mutilation. (*Price v. Tallman*, Coxe, 447.) So, if there is an interlineation in a material part of an appeal bond, which is not noted at the foot thereof, the bond will be defective. (*Sutphin v. Hardenbergh*, 5 Halst. 288. *Shinn v. White*, 6 Id. 137.) So, as to the most trifling alteration in a deed, after it has been acknowledged. (*Moore v. Bickham*, 4

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person county; and, as the complainant alleged upon information and belief, he agreed to make the bond and mortgage payable on demand, and the interest payable semi-annually. On the 10th of May, 1836, Smyth executed to N. F. Waring a bond of that date, conditioned to pay \$3000, in *five* years, with *annual* interest thereon. And on the same day Smyth and his

Binn. 1. *Coit v. Starkweather*, 8 Conn. 289.) Accordingly, it has been held that a purchaser of land is not bound to accept a deed of bargain and sale, in which there is a blank left for the consideration money; although the grantors, after acknowledgment of the deed, have authorized an agent to fill the blank. (*Moore v. Bickham*, *supra*.) But where the principal in a bail bond, after the surety had signed it, but previous to delivery, erased the name of the sheriff as obligee, and inserted that of the constable who served the writ, at his suggestion, and in his presence, the alteration was held not to avoid the obligation of the surety; his consent being presumed. (*Hale v. Russ*, 1 Greenl. 334.) Neither is the insertion of the name of an obligor in the body of a bond, after he has executed it, a material alteration; for he would have been held had the name not been inserted. (*Smith v. Crooker*, 5 Mass. 538. *Stone v. Wilson*, 4 McCord, 203. *Fulton's case*, 7 Cowen, 484.) A deed having been signed, sealed, and delivered, with a blank left for the date, the grantee afterwards inserted the date; the deed was adjudged to be good; the date not being a material part thereof, and no evil design in filling up the blank appearing. (*Whiting v. Daniel*, 1 Hen. & Munf. 291.) But see *Bell v. Quick*, (1 Green, 312,) where the court held that although where the date of a bond is left blank, the bond may be good, yet that any alteration of an instrument after its execution, changes the deed; and if made in the absence of the obligor, and especially of a surety therein, and without his consent and authority, renders it void. In that case it was proved by one of the subscribing witnesses that he filled up the date by the verbal authority and consent of the surety therein. But the court decided that it would not compel a party to receive a bond admitted to have been altered after its execution, and subject himself to the necessity of proving, and the hazard of being able to prove, and the question of its being competent to prove, the consent of the obligor to such alteration, when he comes to seek his remedy on the bond.

Declaration upon a bond executed to A. and assigned to the plaintiff. The bond produced in evidence had an assignment to B. endorsed upon it; which assignment had been stricken out, except the signature of the obligee; above which was endorsed an assignment to the plaintiff. The erasure of the former assignment was held not to produce a variance between the obligation and the proof; there being no evidence of misconduct in the transaction. (*Drummond v. Crutcher*, 2 Wash. 218.)

If a seal has been affixed to a bond, and it be afterwards broken off, or defaced, by accident, the bond will not be avoided. (*Palm*, 403.) Nor will it be avoided by the tearing off, or defacing, of the seal, by the obligor, whether fraudulently or innocently, without the assent of the obligee. (*Touchstone*, ch. 4, § 6, 2. *Cutts v. United States*, 1 Gallis, 69. *United States v. Spalding*, 2 Mason, 478.) Nor by

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wife executed and duly acknowledged a mortgage upon the Jefferson county lands, conditioned to pay the \$3000 in five years, with annual interest, as specified in the bond. Waring, without the consent of either Smyth or his wife, subsequently altered the condition both of the bond and the mortgage; so as to make the \$3000 secured thereby, payable on demand, with

the tearing off the seal by a stranger. (*Rees v. Overbaugh*, 6 Cowen, 746.) It must be an intentional breaking off, or defacing, of the seal, by the party to whom the other is bound, in order to avoid the deed. (*Touch. ch. 4, § 6, 2.*) But the obligee cannot, by removing the seal of one obligor to a several bond, render such bond void as to the other obligors. (*Collins v. Prosser*, 1 Durn. & Cress. 682.)

A testator having drawn his pen through certain words, in a memorandum for a codicil to his will, leaving them still legible, and the scrivener having inserted therein, in the testator's presence, and with his consent, certain other words which were expletives, which he erased after the testator's death, these erasures and interlineations were held not to vitiate the instrument. (*Cogbills v. Cogbills*, 2 Hen. & Munf. 467.) And where the legal effect and construction of an instrument is not rendered different by an alteration, the making of such alteration will not vitiate the instrument. (*Jackson v. Malin*, 15 John. 293. *Malin v. Malin*, 1 Wend. 659.) Accordingly, in *Brown v. Pinkham*, (18 Pick. 172,) it was held, that in a deed of a parcel of land, on which were a well and pump, an interlineation of the words "with pump and well of water," after the description of the land by metes and bounds, was an immaterial alteration; inasmuch as the effect of the deed would be the same, without those words. In *Pringle v. McPherson*, (3 Dessau. 524,) an addition of words to a will, by interlineation in the testator's hand-writing, after the execution thereof, but at a time not ascertained, by which a bequest of personal property was enlarged, was held valid.

Attesting witnesses to a deed are not necessary; and when their names are erased, the party who wishes to avoid the deed must prove that the erasure was made after its execution and delivery. (*Wilkes v. Caulk*, 5 Harr. & John. 36.) But a deed which is left blank in a material part—as in the name of the grantee—is void; and cannot be set up by filling in the blank, after execution. (*Hibblewhite v. McMorris*, 6 Mees. & Wels. 200. See 9 East, 354.) In *Hatch v. Hatch*, (9 Mass. 307,) a deed of land was left as an escrow, to be delivered on the death of the grantor, and was altered by the depository, at the request of the grantee, after the death of the grantor, by changing, in the description of the premises, the given name of a third person from *Joshua* to *Joseph*. It was held not to vitiate the deed. See also *Hall v. Chandler*, (4 Bingham, 123;) 12 Moore. 316; and *Ogle v. Graham*, (2 Penn. Rep. 132;) cases where the alterations were held to be immaterial.

Whether an alteration is material is a question of law; and it is error for the court to leave it to be determined by the jury. (*Stephens v. Graham*, 7 Serg. & Rawle, 508. *Bowers v. Jewell*, 2 N. Hamp. Rep. 543. *Steele v. Spencer*, 1 Peters, 552.)

When alteration is made by consent.] Alterations in a deed, made by consent of

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interest semi-annually. He afterwards informed Smyth of the alteration, and requested him to re-acknowledge the mortgage; but he declined to do so. N. F. Waring subsequently borrowed \$3000 of the Long Island Insurance Company, and gave his note for the same; the payment of which note was guaranteed by his father, the complainant in this cause. And at

the parties, whether such consent be given before or after its execution, will not invalidate such deed. And such consent may be proved by parol. (*Speake v. United States*, 9 Cranch, 28. *Barrington v. Bank of Washington*, 14 Serg. & Rawle, 423. *Boardman v. Gore*, 1 Stew. 517. *Camden Bank v. Hall*, 2 Green. 583. *Wooley v. Constant*, 4 John. 54. *Kerwin's case*, 8 Cowen, 118. *Cole v. Parkin*, 12 East, 471. *Hudson v. Revett*, 2 Moore & Payne, 663. *Coke v. Brummell*, 2 Moore, 495. *Cutts v. United States*, 1 Gall. 71. *Zouch v. Clay*, 2 Lev. 35; 1 Vent. 185, S. C. 11 Co. 27, u. *Markham v. Gonaston*, Moor, 547.) Where the previous decision to the contrary in the same case in Cro. Eliz. 626, was overruled.

Consent must be proved, however, and not conjectured, as a general rule. (*Barrington v. Bank of Washington*, 14 Serg. & Rawle, 424, 5.) Yet it has been held that if blank spaces be left, to be filled after execution, the consent of the party executing that they shall be afterwards filled, is to be implied. (*Wiley v. Moon*, 17 Serg. & Rawle, 438. *Smith v. Crooker*, 5 Mass. 538. *Duncan v. Hodges*, 4 McCord, 239. *Jordan v. Neilson*, 2 Wash. 164. *Boardman v. Gore*, 1 Stew. 517. *Bank v. Curry*, 2 Dana, 142.) The consent of an obligor, to an alteration of the bond, given after the alteration is made, will not repel the plea of *non est factum*. But a consent given before, or at the time of the alteration, will be considered as a re-execution. (*Cleaton v. Chambliss*, 6 Rand. 86. See *Decker's case*, 6 Cowen, 59.)

Presumption as to time of making alteration; and by whom made.] The presumption is that a material alteration, if made, was made after the execution of the instrument; unless the contrary be proved. (*Morris v. Vanderen*, 1 Dall. 67. *Prevost v. Gratz*, Pet. C. C. Rep. 369. *Johnson v. Duke of Marlborough*, 2 Starkie's Rep. 313. *Henman v. Dickinson*, 5 Bing. 183. But see 12 Vin. Abr. 58, contra.) In an action on a bond, against several obligors, where it appears that the name of one of them was erased from the bond, and the suit is brought against all except him, it lies upon the obligee to show that the erasure was made with the consent of the other parties. (*Barrington v. Bank of Washington*, 14 Serg. & Rawle, 405.) A material alteration of a deed of land, while in the possession of the grantee, is *prima facie* fraudulent, and is presumed to have been made by the grantee himself. Neither he, nor any one claiming under him with notice of the alteration, or without having paid an adequate consideration for the land, can avail himself of such deed in evidence; nor can he supply the want of it by parol evidence. (*Chesley v. Frost*, 1 N. Hamp. Rep. 145.)

An interlineation not noted, and of different ink from the rest of the instrument, must, it seems, be explained by him who would support it as genuine. (*Jackson v.*

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the same time he assigned the altered bond and mortgage to that company, as collateral security for the payment of his note; but without informing the complainant, or the officers of the company, that he had altered the condition of the bond and mortgage, after the execution of the same, and without authority.

Jacoby, 9 *Cowen*, 125.) So an erasure or interlineation in a material part of an instrument, of which no notice is taken at the time of execution, is a suspicious circumstance, which requires explanation by the party producing it; and the jury are to determine whether the explanation given is satisfactory. (*Jackson v. Osborn*, 2 *Wend.* 555.)

Alteration how proved.] The fact of an erasure in a deed, though there be a subscribing witness to the deed, may be proved by any other person. (*Penny v. Corwith*, 18 *John.* 499.) On the trial of the question whether an alteration in a will was made by the original draftsman, or by a stranger, evidence of other writings, proved by witnesses, and also of witnesses, is admissible, to show that the peculiarities of the alteration are such as the party frequently used in his ordinary handwriting. (*Smith v. Fenner*, 1 *Gall.* 170.)

Alteration will not divest property once vested.] The alteration, defacing, or cancelling of a deed, will not have the effect, in any case, to divest property which has once vested by transmutation of possession. (*Bolton v. Bishop of Carlisle*, 2 *H. Black.* 263. *Roe, d. Berkeley, v. Archbishop of York*, 6 *East*, 90. *Perrott v. Perrott*, 14 *Id.* 431. *Doe, d. Lewis, v. Bingham*, 4 *B. & Ald.* 675. *Moss v. Mills*, 6 *East*, 148. *Hatch v. Hatch*, 9 *Mass.* 307. *Anon.*, 3 *Salk.* 120. *Holbrook v. Tirrell*, 9 *Pick.* 105. *Gilbert v. Bulkley*, 5 *Conn.* 162. *Jackson v. Anderson*, 4 *Wend.* 474. *Jackson v. Page, Idem.*, 585. *Withers v. Atkinson*, 1 *Watts*, 236.) Thus, if the grantee voluntarily destroys his deed, or fraudulently makes an immaterial alteration therein, his title to the land will not be impaired thereby. (*Barret v. Thorndike*, 1 *Greenl.* 73.) So, though a deed of land be altered, even feloniously, after its execution, this does not avoid the title. (*Jackson v. Jacoby*, 9 *Cowen*, 125. *Lewis v. Payn*, 8 *Id.* 71.) But the alteration avoids the covenants in the deed; a valid deed being essential to these. (8 *Cowen*, 71. *Withers v. Atkinson*, 1 *Watts*, 236.)

Where the subject matter of a deed lies in grant, however, (as, rent or other incorporeal hereditament,) so that the estate cannot exist without deed, because it is of the essence of the estate, any alteration of the deed, material or immaterial, if made by the party claiming the estate, avoids the deed as to him, to all intents and purposes; so that not only all remedy by action, but the estate itself, is gone. (*Lewis v. Payn*, 8 *Cowen*, 71. 1 *Nels. Abr.* 625. *Toml. Law Dict. tit. Deed, III.*) But where a rent was created by duplicate deeds, one being in the hands of each party, and the grantee of the rent altered his deed in a material part, it was held that neither the remedy nor the estate was destroyed; for though his deed was avoided, yet both were originals, and the grantor's deed supported the estate. (*Idem.*)

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When Smyth was called upon, by the Insurance Company, for the payment of the first six months' interest, he objected to the alteration of the bond and mortgage. And the Insurance Company shortly thereafter filed their bill to foreclose the mortgage, and recover the amount of their loan; making Smyth and wife, N. F. Waring, and H. Waring the present complain-

Alteration of instrument prevents a resort to original contract.] Where an agreement is reduced to writing, whether under seal or not, so as to merge the original promise, and the written agreement is so altered as to avoid it, the party cannot resort to the original contract. (*Newell v. Mayberry*, 3 Leigh, 250. *Wheelock v. Freeman*, 13 Pick. 165. *Mills v. Starr*, 2 Bailey, 359.)

Alteration by a stranger.] *Pigot's case*, cited in the text, decides that if a stranger, without the privity of the obligee, alters the deed in any point not material, it will not be thereby avoided. (*S. C. also cited in Davidson v. Cooper*, 11 Mees. & Wels. 799.) And the reason is that the law will not permit a man to take the chance of committing a fraud, and, when that fraud is detected, of recovering on the instrument as it was originally made. In such a case the law intervenes and says, that the deed thus altered no longer continues the same deed, and that no person can sustain an action upon it. And this principle is calculated to prevent fraud, and to deter men from tampering with written securities. (*Broom's Leg. Max.* 65.)

The old doctrine was that alterations, in a material part, by a stranger, without the privity of either party, avoided a deed. (13 Vin. Abr. 39, *Faith (n.) Shep Touch.* 66, [68.] *Cro. Eliz.* 546.) But this doctrine was founded on the technical rule of pleading which allowed the party, under the plea of *non est factum*, to avail himself of the objection; because it was not, at the time of the plea, his deed. This technical nicety and strictness, which avoids a deed in the hands of an innocent person, because it has been altered by a stranger without his knowledge or consent, is contrary to the first principles of justice and common sense, and is not sustained by the modern decisions. (2 Black. Com. 309, n. 24. *Henfree v. Bromley*, 6 East, 309. See *Master v. Miller*, 4 Durn. & East, 320.) On the contrary, it is now settled that an alteration by a stranger, though it be material, will not render the instrument inoperative, if made without the consent of the party. (*Lewis v. Payn*, 8 Cowen, 71. *Nichols v. Johnson*, 10 Conn. Rep. 192. *Wilkes v. Caulk*, 5 Harr. & John. 36. *Wright v. Wright*, 2 Halst. 175. *Jackson v. Malin*, 15 John. 297 per Platt, J.)

An alteration in a bond, by a clerk in the custom-house, after its execution, for the purpose of correcting it, but not affecting its construction, was held to be the act of a stranger, and immaterial; and that it did not avoid the instrument. (*United States v. Hatch*, Paine, 336.) Nor will an erasure of the names of the attesting witnesses to a deed, by a stranger, after its execution and delivery, avoid it; such witnesses not being required. (*Wilkes v. Caulk*, 5 Harr. & John. 36.) Neither will a deed be vitiated by an alteration made therein by the scrivener, at the grantee's

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ant, and others, parties defendant in that suit. In that bill the bond and mortgage were stated to have been executed by Smyth and his wife, conditioned for the payment of \$3000 on demand, with interest semi-annually. Smyth and wife put in an answer to the bill, denying the execution of the bond and mortgage set forth in the bill; but admitting that they executed a bond and mortgage to N. F. Waring, payable in five years, with annual interest. The present complainant, H. Waring, also put in an answer. That cause was subsequently heard upon pleadings and proofs as to him and Smyth and wife; and upon the bill taken as confessed as to N. F. Waring and others, who were made defendants. A decree was made in favor of the Insurance Company, against N. F. Waring, for the amount of the loan to him, with interest and costs, and against the present complainant as the guarantor of the payment of that loan. The decree also directed the bill to be dismissed as to Smyth and wife, but without prejudice to the rights of N. F. Waring, or his assignees, if any such rights existed, upon the bond and mortgage as originally executed. It was further decreed, that upon the payment by H. Waring to the complainants of the amount which he was decreed to pay in consequence of his guaranty, they should assign to him all their interest in the bond and mortgage.

The present complainant was afterwards compelled to pay the amount of that decree. And the Long Island Insurance Company and N. F. Waring thereupon assigned to him all their right and interest in the bond and mortgage, either as they were at the time of the original execution, or as they were after the alteration. Smyth died subsequently to that decree; and by his will devised all of his real estate to his wife. This

suggestion, after the death of the grantor, changing, according to the truth of the case, the Christian name of one of the owners on whom the land was described as adjoining. (*Hatch v. Hatch*, 9 Mass. 307.) Nor will an alteration of a pecuniary legacy, in a will, by the legatee or a stranger, avoid the will as to other bequests. (*Smith v. Fenner*, 1 Gallis, 170.) Nor will the interlineation of a new pecuniary legacy in a will, by the scrivener, at the testator's request, and in the presence of one only of the subscribing witnesses, avoid the will. (*Wheeler v. Bent*, 7 Pick. 61

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bill was filed against her, to obtain satisfaction of the bond and mortgage; and the defendants Mann and A. & W. Nottebohm and others were made parties, as having some interest in the mortgaged premises, as purchasers, incumbrancers, or otherwise, subsequent to the mortgage. And the complainant asked for the usual decree of foreclosure and sale of the mortgaged premises, to satisfy the amount due upon the bond and mortgage, with interest and costs; or for such other relief as he might be entitled to, upon the case made by this bill. C. A. Smyth, the widow and devisee of Charles Smyth, A. Mann, Jr. and A. & W. Nottebohm, put in a general demurrer for want of equity; which demurrer was allowed by the vice chancellor.

The following opinion was delivered by the vice chancellor:

C. H. RUGGLES, V. C. Both the bond and mortgage were altered in material parts by the obligee, while the securities were in his hands, and without the knowledge of the obligor at the time; and there is nothing in the complainant's bill from which the obligor's subsequent assent can be inferred. These alterations, beyond all doubt, rendered these securities void in law. The authorities on this point may be found in all the books, from *Pigott's case*, (11 Co. 27,) to *Lewis v. Payn*, (8 Cowen, 71.) And see *Hurlston on Bonds*, 121. If the alterations of this bond and mortgage were not fraudulent when they were made, they became so by the fraudulent use which was made of the altered instruments. They were assigned by the mortgagee to the Long Island Insurance Company as valid instruments according to their purport, after they had been altered, and after Mr. Smyth, the obligor, had refused to sanction the alterations by a re-acknowledgment. And the obligee covenanted that the mortgage debt of \$3000 was due. The alleged mistake in the bond and mortgage, by which they were made payable in five years, instead of being made payable on demand, does not help the complainant. Admitting there was a mistake which equity would have relieved against, the obligee had no right to take the matter into his own hands, and to rectify it himself, without the judgment of the proper court or

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the consent of the debtor. The bond and mortgage, as they were executed, formed the contract between the parties; and the rectification of a mistake in the writings cannot be made, by a court of law, under any circumstances, nor in a court of equity except on the clearest proof and most weighty caution. (1 *Story's Eq.* § 157.) Certainly a creditor has no power over the written contract of his debtor, to alter it at his pleasure, on a pretence, well or ill founded, of a mistake in drawing the instrument. The bond and mortgage being both void by the alterations, the remaining question is whether the complainant has any such estate in the land, under and by virtue of the mortgage, as will enable him to sustain his bill and have a decree for a sale or a strict foreclosure. It seems to me that he has not. A mortgage never gave to the mortgagee a right to the possession of the land before the condition was broken. There was no possession in the mortgagee in this case. In *Jackson v. Welland*, (4 *John. Rep.* 43,) Chief Justice Kent says, until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. That was a case at law, before the revised statutes, and in England and in this country mortgages are regarded as mere securities for money; giving nothing but a lien on the land, until condition forfeited at least. In courts of equity, this has always been the doctrine concerning mortgages; and they never have been regarded as any thing but securities. The revised statutes now put them on the same footing, at law as in equity, for almost every purpose. No action of ejectment at law can be brought on a mortgage. (2 *R. S.* 312, § 57.) This statute sends a mortgagee into a court of equity for his remedy; where the mortgagee is never regarded as the owner of the land, but as having a mere security on it for a debt. (4 *John. Rep.* 43.) The debt is the principal, the mortgage the incident only. The case of *Lewis v. Payn*, (8 *Cowen*, 71,) does not help the complainant. The doctrine of that case is, in substance, that where an estate is conveyed by deed, and becomes vested by the transmutation of possession, the cancelling of the deed does not divest the estate; because the estate cannot be divested by

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parol, or otherwise, without a deed from him in whom it has become vested. And so of things which lie in grant, as incorporeal hereditaments, commons, ways, rents, which do not pass except by writing. If a man become the owner by a deed of grant, the destruction of the deed is not a destruction of the thing granted; because the owner can only divest himself of his right to this kind of property by deed in writing. But in the latter case, the deed being of the essence of the estate, if the deed be fraudulently altered, it is gone, and the estate goes with it.

The mortgage, in the case now before the court, conveyed no estate by transmutation of possession. It conveyed no incorporeal hereditaments. It gave the mortgagee no seisin, possession, or right of possession, either at law or in equity, until after forfeiture and foreclosure, or sale. The interest of the mortgagee was such as might be discharged and extinguished without deed. For instance, it might have been discharged by payment of the debt, or even by a tender and refusal, or by a voluntary cancelling of the bond.

If the obligee tear off the seal, with an intention to cancel the bond, the obligation will be destroyed. (*Hurlst. on Bonds*, 22.) Bonds, or other executory instruments, which are merely obligatory on the person, may have their effect defeated by an intentional cancellation of the deed by the obligee. (3 *Preston on Abstr.* 103.) The bond is the principal evidence of the debt; and whatever defeats that defeats the mortgage also, which is incident and collateral to the bond. A fraudulent alteration of the bond, by the obligee, in a material part, has the same effect as intentional cancellation. It annuls the bond. I know of no case in which the mortgage can be enforced, to collect a debt which is not due on the bond to which it refers.

Whether the estate of Charles Smyth, deceased, is or is not liable for the money loaned, is a question which need not be here decided. But if it is, it must be from the mere equity arising from the loan, and not on the ground of the validity of the securities. The bond and mortgage being void, the lien is gone. The mortgage is of the essence of the lien. Any act

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in pais which invalidates the mortgage, discharges the lien. The lien is not an estate in possession, nor is it a right which requires a deed to transfer or discharge it. When the complainant lost his remedy on the mortgage, he lost his lien.

It cannot be said that the complainant is entitled to a decree for sale, on the ground of Smyth's verbal agreement to give a bond and mortgage for the money, when the loan was made. If there was such an agreement it was performed. A bond and mortgage were given; but the complainant, by his own fault, has lost the benefit of the securities.

This is doubtless a hard case on the part of the complainant. But a stern rule of public policy stands between him and the relief he asks for. He claims under N. F. Waring, and stands in his place as to his right to recover. Lord Kenyon, in *Masters v. Miller*, (4 T. R. 329,) says that the fraudulent alteration of a deed, by its owner, avoids it; so that no man shall take the chance of committing a fraud without running the risk of losing by the event.

I perceive no mode in which the complainant can hold his lien on the lands in question, without infringing well established principles, which prevail as well in this court as in a court of law. The demurrer must therefore be allowed.

John A. Lott, for appellant. The alteration of the mortgage, by N. F. Waring, did not divest his rights previously acquired under it. Upon the execution of a mortgage, the legal estate vests in the mortgagee; subject to be defeated on the performance of the condition. And nothing short of such performance can deprive him, or his assignees, of that estate. But if the mortgagee's rights under the mortgage became divested, yet the complainant, under the circumstances of the case, is entitled to a decree for the sale of the premises in question, to satisfy the mortgage debt. The money was loaned to Charles Smyth, on an agreement by him to give a mortgage; and that agreement gives the complainant an equity superior to that of the defendants, which the court of chancery will enforce. The estate of Mrs. Smyth, as devisee, is subject to the payment of

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the mortgage debt; and the rights of the other defendants who demur, as judgment creditors, are subordinate to the prior rights of Waring and his assignee.

A. Mann, Jun. for respondents. The bond and mortgage, as set forth in the complainant's bill, in their present form, being forgeries, are void as against the mortgagors and their representatives, and as against the land described in the mortgage. No lien has ever attached by the recording of the mortgage. And even admitting that the alteration did not divest and destroy the interest of the mortgagee, it certainly forever bars the claim of N. F. Waring, or his assignees, through that instrument. The complainant must rely wholly upon his equitable claim under the mortgage as first executed by Smyth and wife. (*Lewis v. Payn*, 8 Cowen, 71.) But the alteration of this bond and mortgage was in the most material part of these instruments, and was made by the party solely benefitted by the change. The bond is unquestionably absolutely void; and the mortgage, as merely collateral thereto and altered in the same vitally important parts, would be void also. The mortgage is a mere security for the debt, and is only a chattel interest; the estate of the mortgagee cannot have existence but by deed; and where the estate can only be created by deed, and the deed is altered in a material part, after delivery, by the party possessing the estate, the deed is void, and the estate which he derived under it is gone. (4 *Kent's Com.* 159, 4th ed. *Lewis v. Payn*, 8 Cowen, 73.)

THE CHANCELLOR. I do not find it stated in the bill, in this cause, whether the mortgaged premises belonged to Charles Smyth, at the date of the mortgage; or whether they belonged to his wife, so that his interest therein terminated at his death. Nor is it stated that either of the defendants who have demurred, claim to have a title or interest in the premises under him. It may not, therefore, be necessary to inquire whether there is any thing in the bill, from which it can be legally inferred that Charles Smyth ratified and assented to the alteration of the

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bond and mortgage. There is no pretence that it was ever ratified by his wife. Indeed, there was no way in which she could ratify the alteration, except by a re-acknowledgment of the mortgage. As to her, therefore, the alteration was a gross fraud, whether she owned the mortgaged premises in her own right, or had only an inchoate right of dower therein. And if her husband had himself consented to the making of the alteration, it still would have been a fraud upon the insurance company, to pass off the altered mortgage to them, as collateral security for their loan, as the true and genuine mortgage of Mrs. Smyth. I think, also, the vice chancellor is right in supposing that there is nothing in this bill from which it can be inferred that Smyth himself assented to this alteration; either before or after it was made. Indeed, the statement in the bill that Smyth declined to re-acknowledge the mortgage, because there was a misunderstanding between him and the mortgagee, shows that the latter could not have supposed that Smyth intended to ratify the alteration at that time, even so far as concerned himself. And he knew, or at least the law presumes he must have known, that Smyth could not ratify the alteration in the mortgage so far as related to the interest of his wife. Nor would Smyth's previous promise, to give a mortgage payable on derhand, with semi-annual interest, be binding upon her, even if it had been in writing, so as to be obligatory upon Smyth himself under the statute of frauds.

The case, therefore, which is presented by the bill, is simply this: The holder of a bond and mortgage, without authority from either of the mortgagors, and without the knowledge of one of them, alters the condition of such bond and mortgage, in two very essential particulars, to their disadvantage; and after the one who is informed of the fact had declined to ratify the alteration, by a re-acknowledgment, the mortgagee passes off the bond and mortgage as valid and genuine securities, to secure the repayment of a loan of money to himself. And the question now to be considered is this: can the assignees of the person who has been guilty of this fraud, or any other person claiming title to the bond and mortgage under him, or them,

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as the assignee thereof, enforce the collection of the mortgage, in a court of equity, against the mortgaged premises, in the hands of the mortgagors, or in the hands of persons claiming title under such mortgagors, or either of them?

It was formerly held, that the alteration of a bond, or other sealed instrument, in a material part, even by a stranger, without the consent of the party whose rights were affected by such alteration, avoided the deed. (*Pigott's case*, 11 *Coke's Rep.* 27.) The modern and more sensible rule, however, is, that such an alteration, if made by a party claiming to recover on such bond or instrument, or by any person under whom he claims, renders the deed void; but that an alteration by a stranger, without the privity or consent of the party interested, will not render the deed void, where the contents of the same, as it originally existed, can be ascertained. (*Rees v. Overbaugh*, 6 *Cowen's Rep.* 746; *Mathis v. Mathis*, 3 *Dev. & Bat. Rep.* 60; *Henfree v. Bromley*, 6 *East*, 309.) I apprehend, however, that the burthen of proof in such cases, is cast upon the party seeking to recover upon the deed, to show that the alteration was not made by him, or by those under whom he claims, nor with his or their privity or consent.

A distinction is made between deeds which operate to convey the title to property, and those which merely give a right of action. For, where the legal title to real estate passes to the grantee by the execution and delivery of a deed, a fraudulent alteration of the deed, by such grantee, will not have the effect to revest the title in the grantor, in cases where the statute of frauds requires a written conveyance to transfer the title. (*Doe, ex dem. Berkley, v. Archbishop of York*, 6 *East's Rep.* 86. *Mitler v. Mainwaring*, *Cro. Car.* 397. *Maginnis v. McCulloch*, *Gilb. Eq. Rep.* 235. *Morgan v. Elam*, 4 *Yerg. Rep.* 375. *Doe, ex dem. Beauland, v. Hirst*, 3 *Stark. Rep.* 60. *Lewis v. Payn*, 8 *Cowen's Rep.* 71.) In this class of cases it is held, that the title to the estate, which was vested in the grantee by a genuine and valid conveyance, remains in the grantee, although he destroys or makes void the deed itself, by a forgery, or by a voluntary cancellation of the conveyance which created that title.

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But the deed itself is avoided thereby ; so that the grantee cannot recover upon the covenants therein, nor sustain any suit founded upon the deed as an existing and valid instrument.

In England it is still held, that a mortgage in fee transfers the legal title to the land, as a conditional estate ; so that if the condition of the mortgage is not strictly complied with, by the payment of the money at the day, a reconveyance is necessary to vest the title of the land in the owner of the equity of redemption, although the debt is subsequently paid. It was upon this principle, I presume, that Lord Hardwick's remark in *Harrison v. Owen*, (1 Atk. 519,) was based. He there says that if a mortgagee cancels a mortgage, it is as much a release as cancelling a bond ; but it will not convey or revest the estate in the mortgagor, for that must be done by some deed. The note of that case by Atkyns is very meagre ; but it is stated more at length by West, from Lord Hardwick's note book, under its proper title of *Harris v. Owen and others*, (*West's Ch. Rep.* 527.) It there appears that the case came before the lord chancellor, on an appeal from a decretal order of the master of the rolls, directing an issue, to try the question whether the bonds and mortgages, given to the testator of the complainants, were cancelled by him. The bill was filed by the executors of the mortgagee, to obtain satisfaction of the bonds and mortgages ; which were found cancelled at his death, although it was not pretended by the defendants that they were ever paid. The complainants insisted that they were entitled to a decree of foreclosure, although the mortgage deeds might have been cancelled by the mortgagee himself, and that the awarding of the issue was improper. But his lordship affirmed the decision of the master of the rolls ; thereby deciding that the representatives of a mortgagee who had voluntarily cancelled or destroyed his mortgage, could not come into the court of chancery to foreclose to the equity of redemption of the mortgagor, or to have satisfaction of the mortgage debt ; although the legal title of the mortgagee, to the mortgaged premises, was not divested by such cancelling.

Upon the principle of that decision, I am satisfied the bill in

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the present case could not be sustained, even England ; where the mortgagee at law is considered as the legal owner of the mortgaged premises, even after the debt is paid or discharged. For if a voluntary destruction of the bond and mortgage, by cancelling, would discharge the debt, so as to deprive the mortgagee of the right to file a bill of foreclosure, in equity, where the mortgage, as well as the bond, is treated as a mere chose in action, or security for the debt, their voluntary destruction by a fraudulent alteration, without the consent of the mortgagors, must have the same effect.

The case is much stronger against the complainant in this state, where the mortgagor is, for most purposes, considered the legal as well as the equitable owner of the mortgaged premises, previous to foreclosure ; and where a discharge of the debt leaves the legal title to the premises in the mortgagor, or those who have derived title thereto under him, as if no mortgage had ever been given. Before the adoption of the revised statutes, it was settled by the courts of this state, that the mortgagor was to be considered as the real owner of the fee, of the lands mortgaged, except for the mere purposes of protecting the mortgagor as the holder of a security thereon for the payment of his debt. (*See Runyan v. Mersereau*, 11 *John. Rep.* 534.) And the revised statutes have restricted the legal rights of the mortgagee still farther ; by depriving him of the power to bring a suit to recover the possession of the mortgaged premises, before a foreclosure. The only right he now has in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. The mortgage then is here nothing but a chose in action ; or a mere lien or security upon the mortgaged premises, as an incident to the debt itself. And where the mortgagee has released or discharged his debt, by an improper and voluntary alteration or destruction of the bond and mortgage by which it is secured, he ought not to be permitted to sustain a suit, in any court, for the recovery of his debt, the basis of which suit must be the securities thus voluntarily destroyed or made void.

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N. F. Waring, the mortgagee, who was guilty of the improper acts of altering this bond and mortgage, and of then passing them off to the insurance company, as good and available securities, certainly would not himself have had the right to come into this court to foreclose the mortgage. And his assignees sit in the seat of their assignor, and are not entitled to any relief, against these defendants, which the assignor himself could not have claimed. The decretal order of the vice chancellor, which is appealed from, is therefore right, and it must be affirmed with costs.

CONCKLIN and others vs. HALL and others.

A peremptory order, obtained by the complainant, for the appointment of a guardian ad litem for infant defendants, is regular, so far, at least, as to protect the title of a purchaser under the decree in the suit in which such order is made.

There is no unbending rule of practice, in relation to the appointment of a guardian ad litem for an infant, upon the application of the complainant, where the infant, or his friends, neglect to procure the appointment of a guardian, for him, within twenty days after the return day of the subpoena.

The usual practice is to grant an order nisi, appointing some suitable person guardian ad litem, for the infant, unless the infant shall, within ten days after service of a copy of the order, procure the appointment of another person.

It seems, however, it is correct practice, for the complainant to give notice to the infant, at the time of serving the subpoena, where he is of the age of fourteen or upwards, or to his relative or protector, in whose presence the subpoena is served, where he is under that age, that if he does not procure the appointment of a guardian ad litem within twenty days after the return day of the subpoena, the complainant will apply to the court, to appoint a guardian for him, without further notice.

In the case of infants who are absentees, it is a matter of course to make an absolute order, for the appointment of a guardian ad litem for them, without further notice, where they, or their friends, do not procure a guardian to be appointed within twenty days after the expiration of the time limited in the order for their appearance.

Where a purchaser at a master's sale, under a decree, is himself a party to the suit in which the decree was entered, he cannot, in a collateral proceeding, raise a question as to the regularity of the decree. If the decree is irregular, so that such purchaser will not get a good title to the premises purchased by him, his remedy is to apply to the court, directly, to set aside the decree on that ground.

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THIS was an appeal from an order of the vice chancellor of the first circuit, directing the appellant to receive and pay for the premises, which he had purchased at a master's sale, or that the premises be re-sold, at his expense and risk. The premises were sold under a decree of foreclosure, and the appellant, B. Melick, who was one of the defendants in the foreclosure suit, became the purchaser. He paid the ten per cent required to be paid down, and signed a written memorandum, containing the terms and conditions of the sale, and stating that he had become the purchaser thereof, at the master's sale, for the sum of \$2600. But he refused to pay the residue of his bid, upon the ground that a peremptory order, for the appointment of a guardian ad litem for the infant defendants, had been made by the late vice chancellor, instead of an order nisi, for the appointment of such guardian unless the infants should procure the appointment of a guardian ad litem for themselves.

G. B. Hall, for appellant. When an infant defendant fails to appear in a suit in equity, the complainant may apply by petition for the appointment of a guardian for the infant, and obtain an order of appointment upon the following conditions: 1. Service of a copy of the order naming a guardian, upon the infant, in a proper manner. 2. The lapse of ten days after such service, and failure of infants to procure the appointment of a guardian. 3. The entry of an order making the former order absolute. (*Knickerbacker v. De Freest*, 2 *Paige's Rep.* 304. 1 *Barb. Ch. Pr.* 84. 1 *Hoff. Ch. Pr.* 171, 172, and note 4.) If the infant can apply to open the decree and set aside the proceeding so as to be let in to appear and defend, the purchaser has a right to object to the title. The infants, in truth, have merits; as appear by the affidavits. Regularly, the order of the vice chancellor for the appointment of a guardian should have been a nisi order. But as it is, the complainant's solicitor should have served each of the infants with a copy of the order as it was granted, and with a notice to procure appointment of guardian in ten days, &c. The appointment of the guardian ad litem being irregular, it is as though no guardian had

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been appointed. The purchaser deems the title unsafe in its present condition. If he erects buildings, the infants can hereafter claim his improvements, with the land. The decree of foreclosure professes to cut off the equity of redemption of the infants, as heirs at law of the mortgagor: and the purchaser bid for such a title.

C. J. De Witt, for respondents. It is in the discretion of the court to appoint guardians ad litem for infant defendants without notice to the infant. And the court will make the appointment, without notice, in all cases where the expense of the appearance and answer of several guardians would be great, or where it is difficult to serve the infant. The affidavit upon which the motion was opposed, did not profess to state the grounds, or even the proceedings, upon which the guardian ad litem was appointed; but the appellant relied simply upon the fact that no copy of the order for the appointment was served upon the infants. It must be presumed, therefore, that sufficient cause was shown for appointing without notice.

THE CHANCELLOR. The order for the appointment of the guardian ad litem was regular; so far at least as to protect the title of the purchaser under the decree. There is no unbending rule of practice in relation to the appointment of a guardian ad litem, for an infant defendant, upon the application of the complainant, where the infant and his friends neglect to procure the appointment of a guardian ad litem, for him, within twenty days after the return day of the subpoena. The usual practice is to grant an order nisi, appointing some suitable person guardian ad litem for the infant defendant, unless the defendant, within ten days after the service of a copy of the order, procures the appointment of another person; as prescribed in the case of *Knickerbacker v. De Freest*, (2 *Paige's Rep.* 304.) But this court has also sanctioned the practice of giving notice to the infant, at the time of serving the subpoena, where he is of the age of fourteen or upwards, or to his relative or protector in whose presence the subpoena is served, where he is under

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that age, that if he does not procure the appointment of a guardian ad litem, within twenty days after the return day of the subpoena, the complainant will apply to the court to appoint a guardian ad litem for him, without further notice. And in the case of infants who are absentees, it is a matter of course to make an absolute order for the appointment of a guardian ad litem, for them, without further notice ; where they or their friends do not procure a guardian to be appointed within twenty days after the expiration of the time limited in the order of the court for their appearance.

The affidavits show, that the course of practice first suggested was not adopted in this case. But the second may have been pursued, notwithstanding the affidavit of one of the infants, that she had no recollection of the service of any paper except the subpoena. Even if the vice chancellor erred, however, in not giving to the infants a further opportunity, to apply and get guardians ad litem appointed for themselves, after the expiration of the twenty days from the return of the subpoena, that formed no sufficient ground for the refusal of the appellant to complete his purchase.

The affidavits do not show that the infants had any defence whatever to the suit ; or that their guardian ad litem had in any way neglected their interests. Under such circumstances, the court would not have set aside the order appointing him, upon their application, even if such application had been made before the sale by the master.

Again ; the purchaser, in this case, was himself a party to the suit, and cannot raise the question as to the regularity of the decree in this collateral way. If the decree was irregular, so that a purchaser at the master's sale would not get a good title to the premises, the appellant might have applied to the court, directly, either in behalf of himself, or of his infant children, to set aside the decree on that ground.

The order appealed from must be affirmed with costs.

AIKIN and others, ex'rs, &c. vs. MORRIS.

Mortgage cases of the fourth class, are entitled to a preference over other causes of that class, unless an affidavit of merits is filed, and the filing thereof noted on the calendar.

It is not necessary that a new affidavit should be filed at every term at which the cause is noticed for hearing. But to deprive the complainant of the preference given by the 91st rule, the fact of the filing of such an affidavit must be noted upon the calendar at each term.

If mortgage causes of the fourth class are not moved at the time that order of business is called for, they lose their preference, and must be heard, with other causes of the fourth class, in the order in which they are placed upon the calendar.

The preference given to mortgage causes of the fourth class, by the rule of the court, also applies to such causes when they are brought before the chancellor upon appeal, if the decree of the vice chancellor was in favor of the complainant. But where the decree was in favor of the defendant, the legal presumption is that the decree was right; and the cause will not be entitled to a preference although no affidavit of merits is made by the respondent.

Where the decision was in favor of the complainant in the foreclosure suit, however, a new affidavit of merits must be filed in the appeal cause, as well as noted on the calendar; or the respondent will have the right to claim a preference over other causes of the same class, when that class of causes is reached.

To constitute a good defence to a bill for the foreclosure of a mortgage, on the ground of fraud in obtaining such mortgage, it is necessary not only to show that the defendant was defrauded, but also that he was defrauded by the mortgagee, or his agents; or, at least, to show that the mortgagee, at the time of taking the mortgage, was aware that a fraud had been committed upon the mortgagor. And the several facts necessary to constitute the fraud, and to bring home to the mortgagee the knowledge of it, should be distinctly stated in the answer of the defendant.

THIS was an application, by the appellant, to set aside a decree of affirmance. The bill was filed by the executors of W. Aikin, deceased, to foreclose a mortgage, given by the defendant to their testator, upon the undivided twentieth part of a tract of land in the town of Greenbush, to secure a part of the unpaid purchase money of the premises. An answer was put in by the defendant, without oath, setting up several matters as grounds of defence to the suit; and the cause was subsequently heard before the vice chancellor of the third circuit, upon pleadings and proofs. When the cause was first noticed for hearing, before the vice chancellor, an affidavit of merits

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was filed, as required by the 91st rule of the court, to prevent the case from having a preference over other causes of the same class. But no affidavit was filed at the term when the cause was heard in the court below, though the cause was argued there by counsel on both sides. The vice chancellor made a decree in favor of the complainants; from which decree the defendant appealed. No affidavit of merits was filed in the appeal cause; nor was the fact that an affidavit had been filed in the court below, noted upon the calendar of the chancellor. And when the fourth class of cases was reached, this case was called as being entitled to a preference, as a foreclosure cause, over other causes of that class; and no counsel appearing to argue the appeal on the part of the appellant, the decree of the vice chancellor was affirmed by default.

The counsel for the defendant, who argued the case in the court below, made affidavit that the appeal was taken in good faith, and that he had intended to argue the cause when it should be reached upon the calendar, and that in his opinion the defendant had a meritorious and equitable defence. But the opinion of the counsel for the complainants, as stated in his affidavit, was that there was not even a shadow of a defence made out by the proofs in the cause. And he also produced and read, in opposition to the application, the pleadings and proofs upon which the case was decided by the vice chancellor; to show there was no defence.

D. Gardner & J. C. Spencer, for appellant.

Samuel Stevens, for the respondents.

THE CHANCELLOR. The decree of affirmance was perfectly regular, according to the settled practice of the court. Mortgage cases of the fourth class are entitled to a preference, over other causes of that class, unless an affidavit of merits is filed, and the filing thereof noted on the calendar. It is not necessary that a new affidavit should be filed at every term the cause is noticed for hearing. But to deprive the complainant

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of the preference given by the 91st rule, the defendant must see that the fact of the filing of such an affidavit is duly noted upon the calendar at every term. The settled practice of the court, upon reaching the fourth class of causes, is to call for mortgage cases of that class; and to hear those as to which there is no note upon the calendar of the filing of an affidavit of merits. And they are then heard in the order in which they stand on the calendar, before any other causes of that class are taken up. But if they are not moved at that time, they lose their preference, and must be heard with other causes of the fourth class, in the order in which they are placed upon the calendar.

The preference given to mortgage cases of the fourth class, also applies to such cases when they are brought before the chancellor upon appeal, if the decree of the vice chancellor was in favor of the complainant. But where the decree was in favor of the defendant, the legal presumption is, that the decree was right; and the cause will not be entitled to a preference, although no affidavit of merits is made by the respondent. In case the decision was in favor of the complainant in the foreclosure suit, however, a new affidavit of merits, in the appeal cause, must be filed, as well as noted on the calendar, or the respondent will have the right to claim a preference, over other causes of the same class, when that class of causes is reached. For counsel, who had advised their client that he had a meritorious defence, before the hearing in the court below, might not be able to do so conscientiously, under his oath of office, after he had heard the arguments of the adverse counsel, and the decision of the vice chancellor upon the merits of the case.

In this case, the excuse appears to be sufficient for not filing an affidavit and noting it on the calendar; as the defendant's solicitor swears that he mistook the practice, by supposing that the last clause of the 91st rule did not apply to appeal causes. I have therefore looked into the pleadings and proofs in this case, for the purpose of seeing whether the counsel, who argued the cause before the vice chancellor, is right in supposing that his client has a meritorious defence. For if he is wrong in

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that respect, there is no ground for disturbing the decree of affirmance, which has been entered by his default. It was upon that ground, and to prevent unnecessary delay, that I permitted the counsel on both sides, upon the argument of this motion, to go fully into the merits of the case.

I am inclined to think the vice chancellor is right in supposing that the answer sets up no good defence to this foreclosure suit. To constitute a good defence, it is necessary not only to show that the defendant was defrauded, but also that he was defrauded by the mortgagee or his agents; or at least to show that the mortgagee, at the time he gave the deed to the defendant, and took back a bond and mortgage for the unpaid purchase money, was aware that the defendant had been deceived and defrauded by others, in making the purchase of the undivided twentieth of the premises from them. And the several facts necessary to constitute the fraud, and to bring home to the mortgagee the knowledge of it, should be distinctly stated in the answer. But even if there are sufficient allegations of fraud in this answer to vitiate the bond and mortgage as against the mortgagee, no such fraud is proved.

It is necessary to see the situation in which the different parties were placed in reference to this transaction, in examining the question whether Aikin was concerned in any of the frauds which were practised upon the defendant by others. Aikin, as the owner of the Greenbush farm, had entered into a written agreement with Hardie to sell and convey the farm to him, on or before the first of April, 1836, for the price of \$60,000, if he should elect to buy the same within that time, and should pay \$20,000 in cash, and give his bond and mortgage upon the whole premises for the residue of the purchase money; payable in eight years, with annual interest. Valentine, being a co-partner with Hardie in the business of buying and selling lands, was jointly interested with him in this contract; although it was given in the name of Hardie alone. Hardie and Valentine afterwards sold half of their interest in this contract to Van Epps and Nicholl. The four persons who had thus obtained the pre-emptive right of purchase at \$60,000, from Aikin, fixed

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their price of the farm at \$100,000 ; which they divided into twenty shares of \$5000 each. They offered the same to purchasers at that price ; one-fourth of the purchase money to be paid down, at the execution of the conveyances to the purchasers, and the residue to be paid in eight years, with interest at the rate of six per cent, payable semi-annually. A contract was subsequently entered into between themselves, as the vendors, of the one part, and the defendant and others, as subscribers for the shares, of the other part, to procure conveyances for the several subscribers upon those terms and at that price ; the contractors themselves subscribing for some of the shares in their own names. The testimony renders it highly probable that Van Epps employed Ackland to get the defendant and others to subscribe for shares in the farm, upon the false representation that Aikin was selling the farm for the \$100,000, and by concealing from them the fact that Hardie and Valentine, and Van Epps and Nicholl, had a contract with Aikin to purchase the farm from him at three-fifths of that sum. But I have not been able to find any evidence that Aikin ever employed either of those persons to act as agents for him ; or that he was aware of the fact that they had professed to act as his agents. Nor is there any thing to satisfy me that he knew any false representations had been made, or that he was aware that any of the subscribers were ignorant of the terms upon which he had agreed to sell the farm, and the price he was to receive for it. The declarations of Van Epps are not evidence against the complainants or their testator, to establish the fact of such agency. And for the same reason, the testimony of Wendell, as to what Van Epps told him, was improperly received.

Aikin appears to have been unacquainted with most of the subscribers, and even with some of the assignees of his contract for the pre-emptive right of purchase, until he was sent for to come to New-York to execute the necessary conveyances, to carry into effect the agreement, made by the subscribers for shares, with the holders of his contract. And in those speculating times, when city lots, even in the wilderness, sometimes doubled and even trebled in price in the course of a few weeks,

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Mr. Aikin might well have supposed that the persons holding his contract for a farm in the new city of East Albany, had honestly resold the site of that city for nearly double the sum which he had contracted with Hardie to sell it to him for, three or four months previous to that time. Every thing that took place at the time of the execution of the deeds and mortgages, may fairly be accounted for upon that supposition. By reference to the contract with Hardie, it will be seen that Aikin was to be paid \$20,000 in cash, and was to receive one mortgage, upon the whole premises, for the residue of the purchase money. But, by the contract between the owners of that pre-emptive right to purchase, and the subscribers for the twenty shares into which the farm was to be divided, each of the subscribers was to have a deed for his own undivided share of the land, and was to give his own bond and mortgage upon that undivided share only. And the interest upon the unpaid purchase money was to be at the rate of six per cent only. It was perfectly natural, therefore, that Aikin should require, of the persons entitled to the benefit of his contract, that all the securities, from them and their sub-contractors, should be taken to himself; to secure the payment of the balance of his \$60,000, and interest, beyond what he should then receive in cash. And as the holders of his contract probably had not the money to pay their quarter down, for the shares subscribed for by themselves, it would be necessary to deduct that amount from their shares of the profits upon their resales. The contract was therefore carried into effect in that way. And he took all the money and securities into his own hands; to be arranged between him and the holders of his contract, according to their rights and interests therein as between themselves. It is true, the subsequent agreement, with Valentine, states that he had assisted Aikin as his agent in making the sale. But the contract with Hardie, which is also in evidence, shows what the nature of that agency was; and that Valentine in fact contracted to sell the premises for the \$100,000, for his own benefit, as one of the owners of the pre-emptive right of purchase. And even if Aikin had in fact employed him as an agent in this matter, there

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is no evidence that Valentine either made representations which were false, or concealed any thing which he ought to have disclosed.

No objection was made, in the answer, for want of proper parties; and no foundation for such an objection appears in the bill. Nor is the allegation in the answer, as to the contract between Aikin of the one part, and Van Epps, Valentine and Hardie of the other, proved in this case. No valid objection to the decree, therefore, exists upon the ground of a want of proper parties. If the defendant has been defrauded by Van Epps, or by his agent, and if it should eventually appear that any part of the fund collected on this bond and mortgage belongs to him, perhaps it may be reached by a bill in this court, to prevent its being paid over to him by the executors. But even that is very doubtful. It is sufficient to say, it cannot be reached by any proceeding in this suit.

The decree of affirmance being regular, and the merits of the case entirely with the respondents, the motion to open that decree must be denied, with costs.

 JONES vs. JONES.

It is not a matter of right, under all circumstances, for a wife who has commenced a suit for a divorce, or for a separation, to require the court to direct an allowance to be paid to her, by the defendant, for the purpose of defraying the expenses of the suit. Nor is it a matter of right that she should be allowed her ad interim alimony, in all cases. But the legislature has left the allowance of both to the sound discretion of the court.

Where it is probable, however, that the wife may succeed—especially in a suit for a divorce on the ground of the adultery of the husband—in which the wife is allowed to prosecute in her own name, and where it appears that she is entirely destitute of the means of carrying on her suit, it is almost a matter of course to require the husband to make her a reasonable allowance, according to his ability, for the necessary expenses of the suit.

It is also a matter of course, in such a case, to require the husband to furnish her with the necessary clothing and sustenance, during the pendency of the suit, if he is able to do so.

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The same general principles are applicable to suits brought by the wife against the husband, for a separation from bed and board, on the ground of cruel treatment, or of abandonment. But in this class of cases the wife cannot institute a suit against her husband without the assistance of a responsible person as her next friend; who is to be answerable to the defendant, for the costs of the litigation, if the complainant fails in the suit. And the court, in cases of this nature, will not direct an advance to be made to the wife, or to the next friend, for the purpose of carrying on the suit, or for alimony pendente lite, where there is no probability that the complainant will be able to succeed in her suit.

THIS was an application, by the complainant, and by her next friend, for ad interim alimony; and for an advance of money, to be made by the defendant, to enable them to carry on this suit, against him, for a separation from bed and board.

J. A. Collier for the complainant.

Ira Harris, for the defendant.

THE CHANCELLOR. It is not a matter of right, under all circumstances, for the wife who has commenced a suit for a divorce, or for a separation, to require the court to direct an allowance to be paid to her, by the defendant, for the purpose of defraying the expenses of the suit. Nor is it a matter of right that she should be allowed her ad interim alimony, in all cases. The legislature has left the allowance of both to the sound discretion of the court before which the suit is instituted. (2 R. S. 148, § 57.) Where it is probable, however, that the wife may succeed, especially in suits for divorce on the ground of adultery of the husband, in which the wife is allowed to prosecute in her own name, and where it appears that she is entirely destitute of the means of carrying on her suit, so as to obtain justice, without a resort to the property of the husband for that purpose, it is almost a matter of course to require him to make her a reasonable allowance for the necessary expenses of the suit; having a due regard to the value of his property, the amount of his income from his own exertions, and the necessary support of himself and others who have claims upon him for subsistence. And, as it would be improper for the complainant

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to cohabit with her husband, during the pendency of such a suit, if she is unable to provide for her own subsistence and he has the means of supporting her, it is also a matter of course to require him to contribute of those means to furnish her with the necessary clothing and sustenance; until it can be legally ascertained whether her charge of adultery against the defendant is true or false.

The same general principles are applicable to suits brought by the wife against the husband, for a separation from bed and board, on the ground of cruel treatment, or of abandonment. But in this last class of cases the legislature has not thought proper to allow the wife to institute a suit against her husband, without the assistance of a responsible person as her next friend; who is answerable to the defendant for the costs, which the latter may be put to by the commencement and prosecution of such suit, in case it eventually appears that the same was instituted against the husband without any sufficient cause. Any other course of proceeding, indeed, would be very liable to disturb the peace of families, by encouraging improper suits, for slight and trivial causes. The court, therefore, in cases of this class, ought not to direct an advance to the next friend, for the purpose of carrying on the suit, where there is no probability whatever that the complainant will eventually be able to succeed. For it would be a useless burthen upon the defendant, to compel him to pay money to the next friend of the complainant, to carry on the suit against her husband, where it was morally certain that the next friend would be obliged to refund such money, with interest, at the termination of the suit. And this appears to me to be such a case.

Every allegation of cruelty charged in the bill, is positively denied by the defendant in his sworn answer. And as the complainant states that all the specific acts of cruelty, set forth in the bill, except the last, took place when no one was present but herself and her husband, it is perfectly evident that she must fail as to them. Indeed she could not have expected to succeed upon those charges, when she filed her bill. For though she admits, in substance, that she has no means of proving

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them, except by a discovery from the defendant, yet she expressly waives a discovery from him. The third charge in the bill relates to the alleged cruelty of the defendant, on the night of the 13th of September, 1845 ; when she says no one was present but herself and her husband, and two boys, Ayrault and Thorp, who were about fifteen years of age. Here, if the allegations in the bill are true, the defendant was guilty of acts of cruelty and brutality towards her, which it is hardly possible to believe any person in human form could have committed. But here, too, it appears, from the affidavits of these boys, which are produced by the defendant in opposition to this application, that every material allegation in the bill as to what took place on that occasion, is absolutely false and groundless ; and that the defendant, upon that occasion, did much less than his duty to himself required him to do. It is sufficient to say that those affidavits corroborate the answer of the defendant, as to what took place on that occasion ; and show that the wife's conduct towards her husband, on that stormy night, was most brutal, and disgraceful to her as a woman.

It may be proper to observe that an affidavit, purporting to have been sworn to by one of these boys, is produced in behalf of the complainant, upon this application, which fully supports her allegations. But in his subsequent affidavit he says he has seen a copy of that affidavit, purporting to have been made by him, and that he never intended to swear to many things stated herein ; and that it must have been read over to him in such a manner that he did not understand it. He then goes on to contradict in detail every material statement, as to improper conduct on the part of the defendant, which is contained in his affidavit on the part of the complainant. Whether the first affidavit was fraudulently misread to this witness, or was sworn to by him understandingly as containing the material facts of the case, is wholly immaterial to the question now under consideration. For if he has been tampered with by the defendant, to contradict under oath what he knew to be the real facts of the case, no court could make a decree for a separation founded

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upon his testimony alone, or even upon testimony of himself and Thorp, supporting the allegations in the bill. For, if they should be called by the complainant and prove those allegations, their affidavits, which were read upon this application, would be sufficient to discredit their testimony in her favor, entirely and effectually.

The complainant also produces the affidavit of Barnes, to prove reproachful language and threats of violence, from the defendant to his wife, in May, 1845. But his general character for truth and veracity is impeached by six witnesses. That, however, is not a sufficient ground for rejecting this application; as his credibility may be sustained upon the taking of the testimony in the cause. The real objection to his affidavit is, that it relates to alleged acts of cruelty which are not stated by the complainant, in her bill, with sufficient certainty to enable the court to found any decree of separation upon them. As there is not the least probability, therefore, that the complainant can succeed in this suit, under any circumstances, it would not be a proper exercise of the discretion of the court to order the defendant to advance money to the next friend of the complainant to aid her in the further prosecution of this cause.

For the same reason, it is not a proper case for the allowance of alimony pendente lite. Besides, it appears that the complainant is as competent to earn her own livelihood, while she chooses to remain separated from her husband, as he is to support himself, and his infant child, without her assistance; although he has some property, which produces an income of about \$70 per annum.

This application must therefore be denied, with taxable costs; to be paid by the next friend of the complainant.

STUYVESANT *vs.* HALL and others.

Where mortgaged premises are sold, subsequent to the date of the mortgage, to different purchasers, in parcels, such parcels, upon a foreclosure of the mortgage are to be sold in the inverse order of their alienation; according to the equitable rights of the different purchasers, as between themselves, in reference to the payment of the mortgage which is a lien upon the equity of redemption in all the parcels.

The same principle is applicable to subsequent incumbrances, upon different portions of the mortgaged premises, either by mortgage or judgment.

If a mortgagee, in such a case, with full notice of the equitable rights of the subsequent purchasers or incumbrancers as between themselves, releases a part of the mortgaged premises, which in equity is primarily liable for the payment of his debt, he will not be permitted to enforce the lien of his mortgage, against other portions of the premises, without first deducting the value of that part of the premises which has been released by him.

The whole object of the recording acts is to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, &c., which are not recorded; and to deprive the holder of the previous unregistered conveyance, or mortgage, of the right which his priority would have given him at the common law. And the recording of a deed, or mortgage, is only constructive notice to those who have subsequently acquired some interest, or right in the property, under the grantor or mortgagor.

The case of *Guion v. Knapp*, (6 *Paige's Rep.* 35,) explained.

What amounts to constructive notice, to the mortgagee, of previous conveyances, or incumbrances.

The commencement of a suit in chancery is only constructive notice, of the pendency of such suit, as against persons who have acquired some title to, or some interest in, the property involved in the litigation, under the defendants, or some of them, *pendente lite*.

One of several executors can release a portion of the mortgaged premises, from the lien of a mortgage given to the testator, without the concurrence of his co-executors.

A satisfaction piece, acknowledged by one of several executors, is sufficient to discharge a mortgage given to the testator, and to authorize the cancelment of the registry of such mortgage.

THIS was an appeal, from a decree of the late assistant vice chancellor of the first circuit. The bill was filed to foreclose a mortgage given by Charles H. Hall to N. W. Stuyvesant, in September, 1824, to secure the payment of \$4,666, at the expiration of twenty years, with interest thereon annually. This mortgage was upon a block of land in the city of New-York, containing fifty-six lots. The mortgage was duly recorded

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soon after its date. And in March, 1827, Hall conveyed to Thomas H. Smith about 240 lots, in the city of New-York, including the premises mortgaged to Stuyvesant, which deed was also duly recorded. In February, 1828, T. H. Smith and G. W. Bruen conveyed the 240 lots to J. Anthon in trust, to secure a debt to John Hone & Sons; and the deed of trust was recorded in the book of conveyances. T. H. Smith died in 1828, and by his will devised all his real estate to his executors, in trust; but G. W. Bruen, one of the executors, alone assumed the execution of the trust. The interest upon Hall's bond and mortgage, which became due on the first of May, 1829, not having been paid, N. W. Stuyvesant shortly thereafter filed a bill to foreclose the mortgage. And he made G. W. Bruen and the heirs of T. H. Smith, J. Anthon the trustee, and John Hone & Sons, the cestuis que trust in the trust deed, and others, defendants in that suit; and that bill contained a statement of the execution of the trust deed, and of the devise of the estate of T. H. Smith to G. W. Bruen, and his co-executors, in trust. But the interest upon the bond and mortgage being paid, that foreclosure suit was discontinued, and the annual interest for seven years thereafter was paid by Hone & Sons to N. W. Stuyvesant, or to his executors.

In May, 1836, Anthon and the cestuis que trust in the trust deed to him, filed a bill to enforce their security, as a mortgage, or charge upon the real estate of Smith embraced therein; in which suit G. W. Bruen and Matthias Bruen alone were made defendants. A decree, establishing the debt of the complainants in that suit, and for a sale of the 240 lots to pay the same, was obtained, and the master was authorized to take bonds and mortgages for the surplus of the purchase money, after satisfying the demand of the then complainants. Under that decree 235 of the lots were sold, including the 56 lots covered by the mortgage of Stuyvesant; and W. H. Thorne became the substituted purchaser thereof, for the aggregate sum of \$467,200. As a security for a part of the purchase money belonging to the complainants in that suit, Thorne, the purchaser, mortgaged to the executors of John Hone 104 of the lots purchased by him

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including 24 of the 56 lots embraced in the mortgage to Stuyvesant. The mortgage to the executors of Hone was dated on the first of February, 1837, and was recorded on the 28th of the same month. And another mortgage was given by Thorne to the master who made the sale, bearing the same date, and recorded a few minutes after the other. This last mortgage was given for the surplus moneys beyond the amount of the debt and costs of the complainants in that suit. And it was subsequently assigned, by the master, to G. W. Bruen, as the executor and trustee of T. H. Smith, under an order of the court.

In August, 1837, the executors of Hone filed a bill to foreclose their mortgage upon the 104 lots; in which suit Thorne, the mortgagor, G. W. Bruen, the assignee of the junior mortgage, and the master to whom such junior mortgage was originally given, were made defendants. And a notice of the commencement and object of that suit was duly filed in the office of the clerk of the city and county of New-York. A decree of foreclosure and sale was subsequently obtained in that suit. In March, 1838, the 104 lots were sold under that decree, and were purchased by the executors of John Hone; and they subsequently partitioned and conveyed them to his children and heirs, according to their several rights and interests in the estate.

N. W. Stuyvesant died in 1833. And in September, 1837, P. Stuyvesant and Catharine A. Catlin, the acting executor and executrix of his estate, upon the application and at the request of G. W. Bruen, gave to Thorne a release; whereby they discharged the whole fifty-six lots from the lien of their mortgage, except fourteen of the twenty-four, which were covered by the mortgage from Thorne to the executors of Hone. But there was nothing in that release which in any way referred to the mortgage to the executors of Hone; nor had the executors of N. W. Stuyvesant any knowledge of the rights of the executors of Hone, under their mortgage from Thorne, at the time of the execution of such release. The husband of Mrs. Catlin the acting executrix, did not join in the release given by her and her co-executor; but he assented to the re-

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lease, and requested his wife to execute it. And the release was acknowledged by her before a proper officer. Subsequently to the execution of that release, the executor and executrix of N. W. Stuyvesant, together with the husband of the executrix, assigned the bond and mortgage originally given to their testator, by Hall, to the complainant in this suit.

The interest upon that bond and mortgage, for the years 1837 and 1838, was paid by G. W. Bruen. But the interest which became due in May, 1839, not being paid, the bill in this cause was filed to foreclose the mortgage. And Hall, the original mortgagor, G. W. Bruen, W. H. Thorne, and the children and heirs of Hone, to whom the fourteen lots which were not released from the complainant's mortgage belonged, were made parties to the suit; together with numerous other persons who had subsequent liens upon the mortgaged premises. The appellants answered the bill. And the cause was heard upon pleadings and proofs as to them, and upon the bill taken as confessed as to most of the other defendants. The assistant vice chancellor decided and decreed that the fourteen lots which were not included in the release, were still charged with the complainant's mortgage; and that the lien of the mortgage upon the fourteen lots was not discharged, nor impaired by the release of the residue of the fifty-six lots. He made an interlocutory decree declaring the rights of the parties accordingly. From this decree, those defendants who had appeared and answered, and who had set up a defence to the suit, appealed to the chancellor.

John Anthon, for the appellants.

Hamilton Fish, for the respondents.

THE CHANCELLOR. The mortgage of February, 1837, to the executors of J. Hone, was entitled to a preference, so far as related to the 24 lots embraced therein, over the mortgage of the same date, to the master, which was afterwards assigned to G. W. Bruen, as the owner of the surplus money upon the sale

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under the decree made in the suit of Anthon and others against George W. and Matthias Bruen. The mortgage to Hone's executors was intentionally recorded a few minutes before the other, for the purpose of securing that preference. As between Hone's executors and G. W. Bruen, therefore, their equities, in relation to the payment of the mortgage of Hall to Stuyvesant, were the same as if Thorne, the owner of the equity of redemption in the whole 56 lots, under the master's deed, had conveyed that equity of redemption in 24 of those lots to the executors of Hone, and had afterwards conveyed the residue of the 56 lots to G. W. Bruen. And upon the foreclosure of the mortgage in this suit, if none of the lots had been released from that mortgage, it would have been a matter of course to direct that the 32 lots, not embraced in the mortgage to Hone's executors, should be first sold to satisfy the amount due upon the complainant's mortgage, with interest and costs.

This court has frequently had occasion to act upon the principle of equity, that where mortgaged premises are subsequently sold to different purchasers in parcels, such parcels, upon a foreclosure of the mortgage, are to be sold in the inverse order of their alienation, according to the equitable rights of the different purchasers, as between themselves, in reference to the payment of the mortgage which is a lien upon the equity of redemption in all the parcels. And the same principle of equity is applicable to subsequent incumbrances, upon different portions of the mortgaged premises, either by mortgage or judgment. (*Hartley v. O'Flaherty, Lloyd & Goold's Rep. Temp. Plunkett, 208. Conrad v. Harrison, 3 Leigh's Rep. 532. New-York Life Insurance and Trust Company v. Milnor and others, 1 Barb. Ch. Rep. 353. Snyder v. Stafford and others, 11 Paige's Rep. 71.*) It has also been decided by this court, that if the mortgagee, in such a case, with full notice of the equitable rights of the subsequent purchasers or incumbrancers, as between themselves, releases a part of mortgaged premises which in equity is primarily liable for the payment of his debt, he will not be permitted to enforce the lien of his mortgage against other portions of the premises; without

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first deducting the value of that part of the premises which has been released by him. (*Guion v. Knapp*, 6 *Paige's Rep.* 35.)

In this case, N. W. Stuyvesant, the mortgagee, undoubtedly had notice of the conveyance from Hall, the mortgagor, to T. H. Smith; of the trust deed from Smith and G. W. Bruen to Anthon; and of the death of Smith and the devise of his estate, or interest, in the equity of redemption to G. W. Bruen. For these facts were all referred to in the bill filed by Stuyvesant in May, 1829, to foreclose his mortgage for the non-payment of the interest money. But if we should even presume that the executors of Stuyvesant had notice of the suit of Anthon and of Hone & Sons, to enforce the security of the trust deed, and of the decree for sale made in that suit, it would not be notice to them of the equity claimed by the appellants here; an equity to have 32 of the 56 lots purchased by Thorne, under that decree, and mortgaged to the master, charged with the payment of the Stuyvesant mortgage, before resorting to the other 24 lots, purchased by Thorne at the same time, and mortgaged to the executors of Hone. Previous to the giving of these two mortgages by Thorne, no equity existed, in behalf of any person, which would have rendered it improper or inequitable for the executors of Stuyvesant to release any part of the mortgaged premises from the lien of their mortgage; even if such executors had received actual notice of all the facts as they then existed. For, as the security of the trust deed, and of the decree obtained under the same, extended to the whole 56 lots embraced in the mortgage to Stuyvesant, a release of any of those lots from the last mentioned mortgage, at that time, might benefit the executors of Hone, but it could not possibly have diminished their security. Every thing that occurred previous to the sale and conveyance by the master, under the decree in that cause, must therefore be laid out of view in deciding the question whether the holders of the Stuyvesant mortgage had notice of any existing equity, in the executors of Hone, which should have prevented them from releasing a part of the 56

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lots from the lien of their mortgage, and leaving their mortgage to be enforced against the other remaining 14 lots.

There is not a particle of proof to charge the acting executor and executrix of Stuyvesant with actual notice of the rights of the executors of Hone, under the mortgage of February, 1837, at the time the release was executed, in September of that year. And if G. W. Bruen, or Thorne, wished to commit a fraud upon the executors of Hone, by obtaining a release of the portion of the premises which was primarily liable for the payment of the mortgage given by Hall, it is wholly improbable that they would inform the executor and executrix of Stuyvesant that Hone's executors had a mortgage upon the 24 lots, which they were proceeding to foreclose; and which mortgage was first recorded, and was entitled to a priority in payment over a subsequent mortgage given by Thorne upon the whole 56 lots embraced in the Stuyvesant mortgage. On the contrary, the natural course of Bruen and Thorne would have been to inform the holders of the Stuyvesant mortgage that Thorne had purchased the whole of the 56 lots, under the decree founded upon the trust deed to Anthon, and to ask the holders of that mortgage to release 42 lots from the lien thereof; leaving their mortgage to remain as a security upon the remaining 14 lots, which, at that time, were of sufficient value to render the collection of the mortgage, and the interest thereon, perfectly safe.

The only remaining question to be considered is, whether the recording of the mortgage of February, 1837, from Thorne to Hone's executors, or the filing of the notice of the pendency of the suit to foreclose that mortgage, was constructive notice, to the executors and executrix of Stuyvesant, of the equitable rights of the executors of Hone under their mortgage. In the case of *Cheesebrough v. Millard*, (1 *John. Ch. Rep.* 414,) Chancellor Kent held, in reference to an equity of this description arising under a judgment, that the docketing of a judgment which became thereby a prior lien upon a part of the mortgaged premises, was not constructive notice to the mortgagee of the whole premises, of the equitable rights of this judgment creditor, under his subsequent judgment. In *Wil-*

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liams v. Sorrel, (4 Ves. 389,) Lord Rosslyn decided that the registry of the assignment of a mortgage was not constructive notice to the mortgagor of the existence of such assignment. And in *Bushel v. Bushel*, (1 Scho. & Lef. 90,) Lord Redesdale, upon a full examination of the question, and of the several decisions in England, came to the conclusion that the registry of a deed or mortgage was not constructive notice of its existence; and that the only effect of the registry was to give it priority over a prior unregistered deed or mortgage. The whole object of the recording acts is to protect subsequent purchasers, and incumbrancers, against previous deeds, mortgages, &c., which are not recorded; and to deprive the holder of the prior unregistered conveyance or mortgage of the right which his priority would have given him at the common law. The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor, or mortgagor. Thus, in the case of *Lieby v. Wolf*, (10 Ohio Rep. 80,) where the owner of an unrecorded lease mortgaged his interest in the leasehold premises, and the mortgage was duly recorded, and he afterwards conveyed his interest in the lease to another person, who surrendered the lease and took a new one from the original lessors, and afterwards sold such new lease to a bona fide purchaser, the supreme court of Ohio decided that the registry of the mortgage given by the first lessee was not constructive notice of the existence of such mortgage against the purchaser of the right of the lessee under the new lease. That such purchaser did not derive his title to the premises from the mortgagor, under and through the original lease to him, but from the lessors in the new lease, and through that lease only. (See also *Halstead v. The Bank of Kentucky*, 4 J. J. Marsh. Rep. 558; *Wiseman v. Westland*, 1 Young & Jerv. Rep. 117; *Bedford v. Backhouse*, W. Kelynge, 5.)

The assistant vice chancellor is right in supposing that this court, in the case of *Guion v. Knapp*, (6 Paige's Rep. 35,) did not intend to decide that the recording of a subsequent deed, given by the mortgagor, was constructive notice to the mortgagee

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of the equitable right, of the grantee in that deed, to have the residue of the mortgaged premises, not embraced in his deed, first charged with the amount due upon the mortgage. In that case the mortgagees had taken an assignment of a subsequent mortgage of a part of the mortgaged premises; which mortgage, upon its face, showed that Humphrey and Palmer had purchased parts of the premises covered by the original mortgage. This was held sufficient to make it their duty to inquire as to the equitable rights of Humphrey and Palmer, in reference to the mortgage, before the lands still belonging to their grantor were released. And the recording of the deeds to Humphrey and Palmer is only referred to, by the court, to show that if such inquiries had been made, there would have been no difficulty in ascertaining their equitable rights, from the examination of the records alone.

In that case too, this court expressly decided that the right of subsequent purchasers, or incumbrancers, of different parts of the mortgaged premises, to have such parts charged in the inverse order of their alienation, was not a legal but an equitable right, and was governed by equitable principles. And that the conscience of the party, who held the incumbrance on the whole premises, was not affected unless he was informed of the existence of the facts upon which that equitable right depended; or had sufficient notice to put him upon inquiry. In the case of *Jones v. Smith*, (1 *Hare's Ch. Rep.* 55,) Sir James Wigram says, the cases in which constructive notice has been established resolve themselves into two classes: *First*, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected; and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstances affecting the property, and respecting which he had actual notice. *Secondly*, cases in which the court is satisfied, by the evidence, that the party charged with notice has designedly abstained from making inquiry, for the very purpose of avoiding notice

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Testing the case under consideration by these principles, there is nothing to charge the executor and executrix of Stuyvesant with constructive notice that the executors of Hone had a mortgage upon a part of the 56 lots, embraced in the Stuyvesant mortgage and in the master's deed to Thorne, at the time they executed the release, in September, 1837.

It is true the executors of Hone, a few weeks before that time, had filed a bill against Thorne and G. W. Bruen, and the master, to whom the junior mortgage was given, to foreclose the prior mortgage upon the 24 lots; and a notice of the pendency of that suit was filed in the proper office, to make the filing constructive notice to a purchaser. But the executor and executrix of Stuyvesant were not made parties to that suit; nor is there any proof from which it can reasonably be inferred that they ever heard that such a suit had been brought. And the commencement of a suit in chancery is only constructive notice, of the pendency of such suit, as against persons who have acquired some title to, or some interest in, the property involved in the litigation, under the defendants, or some of them, *pendente lite*.

It is not necessary to inquire whether an executrix, who is a feme covert, can release a portion of the mortgaged premises from the lien of a mortgage, given to the testator, without the concurrence of her husband, signified by his joining with her in such release. For, the release of one of two executors is sufficient. And a satisfaction piece acknowledged by one of the executors, would be sufficient to discharge the whole mortgage, and to authorize the cancelment of the registry of such mortgage.

Nor was the objection well taken, that the complainant in this case was bound to file her bill against the present owners of the whole 56 lots; charging that the release was obtained for the purpose of defrauding the executors of Hone. If the executor and executrix of Stuyvesant acted in good faith, and without any intention of committing a fraud, it was sufficient for their assignee to file her bill against those who had subsisting interests in that portion of the mortgaged premises which had

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not been released. And if the 32 lots, not embraced in the mortgage to the executors of Hone, and which were primarily chargeable with the payment of the Stuyvesant mortgage before the execution of the release, have not gone into the hands of bona fide purchasers, but still belong to Thorne, or G. W. Bruen, the present owners of the 14 lots which were not released, will have no difficulty, upon a proper bill, in charging the lands held by them with the amount for which those 14 lots were liable when the release was obtained.

The decree of the assistant vice chancellor was not erroneous; and it must be affirmed with costs.

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It seems that a surrogate is not authorized to make an order for the sale of the real estate of a decedent, for the mere purpose of paying the executors or administrators the amount of their claim for the expenses of administration; and where there are no existing debts for which the devisees, or heirs at law of the decedent, are liable in respect to the real estate which had come to them, by devise or descent.

It is the duty of executors and administrators to retain sufficient of the personal estate of the decedent, in their hands, to pay the expenses of the administration. And they cannot apply to the surrogate for the sale of the real estate of the decedent, to pay such expenses, after the lapse of three years from the time of granting letters testamentary, or of administration, to them.

All of the executors, or administrators, should join in an application to the surrogate, for an order to sell the real estate of the decedent for the payment of debts. And an order allowing part of the administrators to make such a sale, without the consent or concurrence of the others, is erroneous.

THIS was an appeal, from an order of the surrogate of the county of Rensselaer, directing the sale of the real estate of J. J. Van Alstyne, deceased. The petitioners, together with the widow of the decedent, were appointed administrators of his estate, in September, 1834. In June, 1835, they applied to the surrogate for the sale of the real estate, or a part of it, for the

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payment of debts. And such proceedings thereon were had that two pieces of land were sold, under the order of the surrogate, and the proceeds thereof were distributed according to law. The respondents afterwards applied for the final settlement of their accounts as administrators. And in July, 1838, the surrogate decided that they had duly administered and accounted for all the personal estate which had come to their hands. He also decided and decreed that there was due, from the estate of the deceased, to Witbeck, one of the administrators, \$81,83, and to Brockway, another of the administrators, \$69,43.

In June, 1839, Witbeck and Brockway, without the concurrence of the administratrix, presented a petition to the surrogate, stating these facts, and also stating that S. McClellan had a debt of about \$50 against the decedent; and that there were other creditors of the deceased, the amount of whose respective debts were unknown to the petitioners, but that the petitioners believed the aggregate amount of such debts amounted to about \$2500. They therefore prayed for a sale of other portions of the estate of the decedent, to pay and satisfy those debts. An order was thereupon made, for the persons interested in the real estate to show cause why the prayer of the petition should not be granted. And, upon the day specified in the order, the appellant, and others interested in the real estate of the decedent, appeared, by their counsel, and filed the following objections before the surrogate: *First*, that the application was not made within three years from the time of granting letters of administration. *Secondly*, that it did not appear that the personal estate of the decedent had been exhausted in the payment of debts. *Thirdly*, that it did not appear that the debts were due from the decedent. *Fourthly*, that two of the administrators could not make the application without the concurrence of the other. And, *Fifthly*, that there had been one sale, and that the creditors had not been notified to produce and exhibit their claims.

The surrogate, notwithstanding these objections, made an order, reciting that such proceedings had been had upon the

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petition, before him, that he was satisfied, upon due examination of the premises, that the administrators had fully complied with the provisions of the statute, and that the debts outstanding against the deceased, so far as the same could be ascertained, were about the sum of \$156; and authorizing the said administrators to sell a certain specified portion of the real estate of the decedent, to enable them to pay his debts.

J. Rhoades, for the appellant.

H. P. Hunt, for the respondents.

THE CHANCELLOR. From a careful examination of the provisions of the revised statutes, I am satisfied that several of the appellant's objections to the proceedings before the surrogate were well taken. The return states that the order appealed from was made after hearing the proofs and allegations of the parties. No proofs, however, are returned by the surrogate. But the return states that it appears by the minutes of the surrogate, that upon the hearing before him, the administrators abandoned all claim for authority to mortgage or sell the real estate of the decedent, except for the purpose of paying the claims of the administrators. The return also states that it appeared, by the proofs, that their claim was for the amount allowed them, upon the final settlement of their accounts, for disbursements, expenses and commissions in the administration of the estate; and for the surrogate's fees and charges, upon the application for the final settlement of their accounts as administrators. It is evident, therefore, that no part of the \$156, for the payment of which this order of sale was made, was a debt due from, or owing by, the decedent. Nor was it a part of the debts which the surrogate, upon making the first order of sale, in 1835, allowed and adjudged to be valid and subsisting demands against the estate of the deceased. (*See 2 R. S. 102, § 13.*) This proceeding, therefore, was not a continuation of the application made in 1835. But it was an original application, on the part of the administrators as such,

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and not by the creditors of the decedent, for a further sale of real estate to pay debts which were not allowed by the surrogate upon the making of the first order. They were therefore bound to make their application within three years after the granting of the letters of administration to them, in 1834.

It is very doubtful also whether the surrogate is authorized to make an order for the sale of the real estate of the deceased for the mere purpose of paying the executors or administrators their claim for the expenses of administration; where there are no existing debts for which the devisees, or heirs at law of the decedent, were liable in respect to the real estate which had come to them, by devise or descent. The executor or administrator should retain sufficient of the personal estate in his hands to pay the expenses of the administration. The petitioners in this case, upon the completion of the first sale, should have brought in their whole claim, for expenses and commissions then due to them, for those proceedings; so that the amount of such claim might be deducted from the proceeds of the sale. And if they had paid any debts out of the personal estate, so that there was not enough left to pay their expenses of administration, they should then have asked to be subrogated to the rights of the creditors, whose debts had been thus paid, in the distribution of the proceeds of the sale of the real estate; if the surrogate had any power to allow of such a substitution.

But even if these petitioners had been original creditors of the decedent, they were not authorized, in their character of administrators, after the expiration of the three years, to apply for a sale of real estate, to pay debts which were not allowed by the surrogate at the time of the making of the first order. The seventy-second section of the act of May, 1837, (*Laws of 1837, p. 536,*) allows a creditor of the deceased to make an application to the surrogate for an order to compel the executors and administrators to sell. But that proceeding must be instituted and conducted according to the original provisions of the revised statutes, on that subject, by citing the personal representatives of the testator, or intestate, to show cause why

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they should not be compelled to proceed before the surrogate for a sale of his real estate.

I am also inclined to think it was a valid objection to the proceedings of the respondents, in the present case, that the administratrix did not join with them in the application. And that the order is erroneous in allowing the administrators to make the sale without her consent and concurrence; especially as no reason is stated in the petition for not making her a party to the proceedings.

The order appealed from is erroneous, and must be reversed; and the petition of the respondents must be dismissed. But under the circumstances of this case I shall not charge them with costs.

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[Approved, 74 Pa. St. 397. Distinguished, 1 T. & C. 515. See *post*, p. 354.]

Previous to the revised statutes, a judgment in a court of record, in this state, was a lien upon the lands of the judgment debtor from the time of the entry thereof; whether docketed or not. But if the judgment was not properly docketed, it did not affect the lands of the judgment debtor, as against subsequent purchasers or mortgagees.

But even as to them, the undocketed judgment was entitled to priority in equity, if the purchaser or mortgagee had notice of its existence at the time of his purchase, or when he took his mortgage.

And the first judgment was entitled to a preference, although not docketed, over the lien of a junior judgment which had been docketed. But if the land of the debtor had been sold by the sheriff, under an execution upon the junior judgment, to a purchaser who had no notice of the prior judgment, such purchaser took the land discharged of the lien of the elder judgment.

But under the revised statutes, no judgment will affect any lands, tenements, real estate, or chattels real, or have any preference as against other judgment creditors, until the record thereof has been filed and docketed.

The effect of the new provisions of the statute, is to prevent the common law lien of the judgment from attaching at all upon the real estate of the judgment debtor until the judgment has been actually docketed; and not merely to protect bona fide purchasers and incumbrancers who had no notice of the existence of the judgment when their interest in, or liens upon, the real estate of the judgment

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debtor accrued. And the provisions of the act of May 14, 1840, on this subject are also in accordance with this construction of the revised statutes.

The court of chancery may enforce an equitable lien, either upon a legal, or upon an equitable estate in lands.

And where the common law, or a statute, creates a lien upon a legal interest in land, the court of chancery, by analogy, sometimes declares and enforces a similar lien upon an equitable estate therein.

But where the lien is created by statute, and the lien itself, as well as the estate against which it is sought to be enforced, is purely legal, chancery is not authorized to extend the lien to cases not provided for by the statute.

The fact that an error, which occurred in the docketing of a judgment, was the error of the clerk, and not the fault of the judgment creditor, or of his attorney, will not authorize the court of chancery to interfere, to deprive another judgment creditor of his legal priority, if he has obtained one, by such error.

Although the statute respecting the docketing of judgments does not declare, in express terms, that the judgment shall be entered by the clerk, in the alphabetical docket, under the letter corresponding with the surname of the judgment debtor, yet such has been the practical construction which has been given to the statute for more than a quarter of a century; and it is the only sensible construction which can be given to it. It was accordingly

Held, that the docketing of a judgment against P. S., under the letter P., the initial letter of his christian name, instead of the letter S., the initial letter of his surname, was not even a substantial compliance with the requirements of the statute.

It is a settled principle of the law of partnership, that the partnership effects are to be first applied to the payment of the debts of the firm, and to equalize the claims upon the different copartners in relation to the fund. In other words, the separate estate or interest of a copartner in any of the copartnership property, is only his share of that part of the copartnership effects, or of the proceeds thereof, which remains, after the debts of the firm and the demands of his copartners, as such, are satisfied.

And if one of the copartners has paid more than his share of the partnership debts, he has a claim upon the partnership property, which in equity is paramount to the claims of the separate creditors of his copartner.

Where real estate is conveyed to copartners, in their individual names, for the use and benefit of the firm, or is so conveyed to them in payment of debts due to the partnership, the legal title vests in the grantees thereof, as in an ordinary conveyance of real estate. And, by the common law, where land was purchased with copartnership funds, for copartnership purposes, and was conveyed to all the partners, generally, in fee, it would, at law, create a joint tenancy; so that neither could convey any more than his share of the land, during the lives of his copartners. And upon the death of either of the copartners, without having severed the joint tenancy by a conveyance, the legal title to the whole of the land would survive to the other copartners.

But under the statutes of New-York relative to joint tenancies, the several copartners, to whom such a conveyance was made, would become tenants in common of the legal title. And upon the death of either, the undivided portion of the legal title,

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thus vested in the deceased partner, would descend to his heirs at law; without reference to the equitable rights of the several partners, in the land, as a part of the property of the firm.

And a bona fide purchaser, or mortgagee, who obtains the legal title to partnership lands, or to an undivided portion thereof, from the person who holds such legal title, and without notice of the equitable rights of others in the property, as a part of the funds of the copartnership, is entitled to protection in courts of equity, as well as in courts of law.

Where real estate is purchased with partnership funds, for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, such real estate in England is considered and treated, in equity, as the property of the members of the firm collectively; and as liable to all the equitable rights of the partners, as between themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those who are beneficially interested in the fund; not only during the existence of the copartnership, but also upon the dissolution thereof.

It is the general rule, in England, that real estate belonging to a copartnership, unless there is something in the partnership articles to give it a different direction, is to be considered in equity as personal property; and upon the death of one of the copartners, and after the debts of the firm have been paid, and the equities have been adjusted between the several members of the firm, it goes to the personal representatives of the deceased partner, and not to his heirs.

The American decisions, in respect to real estate purchased with partnership funds, or for the use of the firm, establish two principles: *First*, that such real estate is in equity chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another, upon the winding up of the affairs of the firm; *Secondly*, that, as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is to be considered and treated as real estate.

Although a court of equity considers and treats real property as a part of the stock of the firm, it leaves the legal title undisturbed, in this state, except so far as is necessary to protect the equitable rights of the several members of the firm therein.

The separate creditors, of individual partners, have no equitable right to any part of the partnership property until the debts of the firm are provided for, and the rights of the partners, as between themselves, are fully protected.

The general lien of a judgment creditor, upon the lands of his debtor, is subject to all equities which existed against such lands, in favor of third persons, at the time of the recovery of the judgment. And the court of chancery will so control the legal lien, of the judgment creditor, as to restrict it to the actual interest of the judgment debtor in the property; so as fully to protect the rights of those who have a prior equitable interest in such property; or in the proceeds thereof.

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THIS was an appeal, from a decretal order of the late vice chancellor of the first circuit, relative to the disposition of the surplus moneys, upon the sale of mortgaged premises, under a decree of foreclosure. Peter Naylor and Palmer Sumner were formerly in copartnership, and the mortgaged premises were conveyed to them, by a debtor of the firm, in payment of a copartnership debt. Upon the winding up of the affairs of the copartnership, Naylor had to pay out, to the creditors of the firm, about \$5000 beyond his rateable proportion of the debts. And for the balance thus due to him he recovered a judgment against Sumner, in the superior court of the city of New-York, on the 20th of May 1842. On the same day he procured a transcript of the judgment, from the docket in the office of the clerk of the superior court, and delivered the same to the clerk of the city and county of New-York, where the mortgaged premises were situated, to be filed and docketed according to law. The transcript was filed, and the judgment duly docketed by such clerk, on the 20th of May, 1842, except that he mistook the christian name of Palmer Sumner for the family name, and therefore docketed the judgment under the letter P. instead of the letter S.; and placed the real christian name first, in the entry upon the docket. In December, 1842, the president, directors and company of the Mount Vernon Bank recovered a judgment, in the same court, against Palmer Sumner and George Stevens, for about \$1800; which judgment was duly docketed in the office of the clerk of the city and county of New-York on the same day. The bill in this suit was subsequently filed, to foreclose the mortgage, and the appellant and respondent were both made parties to the suit; but the appellants and their solicitor were ignorant of the existence of the judgment of Naylor, until after the sale of the mortgaged premises, by the master. An application was afterwards made to the superior court, by Naylor, to have the docket of his judgment amended *nunc pro tunc*; and the motion was granted, without prejudice to the rights of subsequent judgment creditors, whose judgments were docketed previous to that application.

Upon a reference to a master to ascertain who was entitled

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to the surplus moneys, and the priorities of the liens of the several claimants, the master decided that Naylor was the owner in fee of one half of the mortgaged premises, and was therefore entitled to one half of the purchase moneys, on that ground. He also reported that Naylor's judgment was entitled to priority in payment, over the judgment of the Mount Vernon Bank, out of the other half of the surplus moneys. The Mount Vernon Bank excepted to this last part of the master's report. And, upon argument of the exceptions, the vice chancellor overruled them; and directed the clerk to pay the surplus moneys to Naylor. From this order the Mount Vernon Bank appealed to the chancellor.

W. J. Hoppin & S. C. Williams, for the appellants. The question before this court may be briefly stated thus: Which of two judgment creditors of Sumner has the prior lien upon the mortgaged premises, and consequently on the surplus moneys in this suit; Peter Naylor, whose judgment was obtained on the 20th May, 1842, but on account of a mistake of the county clerk, was not docketed in his office, according to the statute, until the 9th day of December, 1844: or the Mount Vernon Bank, whose judgment was obtained and docketed in the county clerk's office two years previously, on the 9th day of December, 1842? The appellants contend that they have the prior lien; and in that behalf insist, 1. That the lien of the Mount Vernon Bank on the surplus moneys in this suit is prior in law to that of Peter Naylor; 2. That a court of equity can give Naylor no relief in the premises; and 3. That the appellants have equitable claims which entitle them to the favorable consideration of this court: I. The lien of the judgment of the Mount Vernon Bank against Palmer Sumner is prior in law to that of the judgment of Peter Naylor against Sumner. The judgment of the bank became a lien on the estate of Palmer Sumner on the 9th day of December, 1842, when it was docketed according to law, in the office of the clerk of the city and county of New-York. The following is the substance of all the statutes regulating the liens of judgments on real estate,

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important to be noticed in this connection. By 2 *R. S.* 359, § 3, it is provided that all judgments hereafter rendered in any court of record, shall bind and be a charge upon the lands, tenements, real estate and chattels real of every person against whom such judgment shall be rendered, which such person may have at the time of docketing such judgment, or which such person shall acquire at any time thereafter; and such estate and chattels real shall be subject to be sold upon execution to be issued on such judgment. By 2 *R. S.* 359, § 12, no judgment shall affect any lands, tenements, real estate or chattels real or have any preference as against other judgment creditors, purchasers or mortgagees, until the record thereof be filed and docketed as therein directed. By 2 *R. S.* 359, § 13, the mode of docketing is prescribed thus: At the time of filing a record of judgment, the clerk shall enter in an alphabetical docket, in books to be provided and kept by him, a statement of such judgment, containing 1. The names at length of all the parties to such judgment, designating particularly those against whom it is rendered, with their places of abode, title, trades or professions, if any such are stated in such record. 2. The amount of the debt, damages, or other sum of money recovered, with the costs. 3. The hour and day of entering such docket. 4. If the judgment be against several persons, such statement shall be repeated under the name of each person against whom the judgment was recovered, in the alphabetical order of their names respectively. By the 25th section of the act concerning costs and fees in courts of law and for other purposes, passed May 14, 1840, (*Laws of 1840*, p. 334,) no judgment or decree, which shall be entered after the act takes effect, shall be a lien upon real estate, unless the same shall be docketed in books to be provided and kept for that purpose, by the county clerk of the county where the lands are situate. If such judgment shall not be docketed within ten days from the time when it was perfected, it shall only be a lien from the time of docketing. (§ 26.) After this act takes effect, the judgments of the superior court of the city of New-York, and of all mayors' courts, shall be docketed with the clerk of the county where

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the same is held, before such judgments shall become a lien. (§ 28.) The county clerk shall provide and keep proper books, in which he shall docket all judgments and decrees in their regular order, according to priority, whether the judgment be rendered in the court of which he is clerk, or in some other court, and in all cases shall specify the court in which the judgment or decree was recovered or made. (§ 34.)

The judgment of the appellants was docketed according to the provisions of all the above statutes, in the offices of the clerks of the superior court, and of the city and county of New-York, on the 9th day of December, 1842, and consequently became a lien on that day. Naylor's judgment was not a lien on Sumner's real estate until the 9th day of December, 1844, when it was first docketed in the office of the clerk of the city and county of New-York, and two years after the judgment of the appellants was docketed. The filing of the transcript of Naylor's judgment, and other proceedings of the 20th May, 1842, did not amount to a docketing according to the statutes. Merely filing the transcript with the county clerk was not docketing: the statutes speak of filing and docketing. Entering this judgment under the name of Sumner Palmer was no better than entering it against John Smith or any other name. The object of the statutes is to have notice given. And this object was as effectually defeated by entering the judgment against Sumner Palmer, as if it had been entered against John Smith. It has been decided, under the registry laws in England, that if the name of a defendant be falsely entered, as Compton for Crompton, the judgment will be void against purchasers, and the court will not amend the record. (*Sales v. Crompton*, 1 Wils. 61. 2 *Strange*, 1209.) The revised statutes prescribe the mode of docketing judgments; which mode must be holden to apply to the clerks of counties, as well as to the clerks of the supreme court, as no other method is pointed out by law. These statutes prescribe that an alphabetical record shall be kept, in which the names at length of all the parties shall be kept, designating particularly the defendants. Now this would be an absurdity, except it be holden to mean that their sur-

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names shall be arranged in alphabetical order. Naylor, by an application to the superior court to docket his judgment nunc pro tunc, clearly admitted that it was not docketed at the time of the application. If it had been docketed, there was no necessity for the application. The object of the application was to have the judgment docketed in such a manner as to make it a lien on the surplus in this cause. If it were already a lien, no such application was necessary. The superior court, by the order which they made upon that application, clearly recognize the fact that the judgment had not been previously docketed according to law. If it had been docketed so as to have a binding force, they would have rejected the application as unnecessary.

It is contended on the other side, that it is the date of the judgment, and not the docketing, which establishes the priority of lien to the surplus moneys in a foreclosure suit; and that the statutes which require the docketing of judgments are intended for the protection of bona fide purchasers or incumbrancers only. Such a construction as this is directly opposed to the language and spirit of the statutes. It will not be seriously denied, that the liens upon the surplus moneys are to be marshalled in the same way as they would have been upon the real estate, if the mortgage had not been foreclosed. The sole foundation of the right of judgment creditors to the surplus moneys, is their lien upon the real estate from the sale of which the money arises. Now, as to real estate, nothing can be plainer than the words of the statutes, "No judgment shall be a lien until it is docketed," &c. And besides, by § 30 of the act of 1840, no judgment creditor can sell lands under execution until his judgment is docketed in the county where the lands lie. This clearly shows the intention of the legislature to give him a preference not only against subsequent incumbrancers, but against prior judgment creditors whose judgments had not been docketed. It would be a monstrous doctrine for this court to hold that masters, to whom it is referred to ascertain the priority of liens in a cause, have power to go behind the dockets of judgments, and report that one judgment is to be preferred to

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another solely because it was obtained at an earlier date. It is submitted, therefore, as being conclusively shewn, that Naylor's judgment was not a lien on Sumner's real estate until the 9th day of December, 1844, when it was first docketed in the county clerk's office, and two years after the docketing of the judgment of the appellants.

The order of the superior court docketing Naylor's judgment nunc pro tunc as of May 20, 1842, with a proviso, does not make Naylor's judgment a lien prior to the appellants' judgment; but on the contrary it expressly recognizes the priority of the bank. This is apparent from the express terms of the proviso, that the clerk shall express in the said book of dockets opposite said defendant's name where said judgment is docketed therein, that the rights of judgment creditors of said Palmer Sumner, whose judgments shall have been docketed in the said office of the clerk of the city and county of New-York between the said 20th day of May, 1842, and the day of entering this rule, shall not be prejudiced by such alteration of said book of dockets. This proviso clearly saves all the appellants' rights. The word rights, as used in this order, is a comprehensive one, covering legal as well as equitable rights, liens and privileges. It is accompanied by no limitation or restriction; and if it means any thing, it means that all the rights, of every name or kind, which the appellants possessed in the premises before the 9th day of December, 1844, were not to be prejudiced by this order: that the appellants, at any rate, were to retain the same rights against Sumner's real property which they had before the order was entered. It has been argued on behalf of Naylor, that the court, by this order, intended to reserve only the equities of the judgment creditors embraced in the category of the proviso. But this interpretation would be limiting and contradicting the express terms of the proviso; and would, besides, be irreconcilable with the line of argument upon which the application was resisted, and which, it is believed, was sustained by the court. If the court had meant to reserve only the equities of those creditors, it would have chosen a different phraseology.

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And not only does this order by its express terms recognize the prior lien of the judgment of the appellants, but the court could not lawfully have made an order which should interfere with those prior rights. The superior court, by cutting off the prior lien of the Mount Vernon Bank, would have destroyed a right vested in the bank, at the time the statute was passed, authorizing that court to amend the docket of its judgments in the county clerk's office. And this was the principal ground on which the application was resisted. The application to the superior court, by Peter Naylor, was made under an act regulating liens on real estate by judgments and decrees, passed April 1st, 1844, sixteen months after the lien of the Mount Vernon Bank accrued. The seventh section of that act provides that the supreme court, the court of chancery, the superior court of the city of New-York, and the several mayors' courts, shall respectively have and possess the same jurisdiction and power concerning the dockets of their judgments kept by the several county clerks, which the supreme court possesses concerning the dockets of its judgments in the office of the clerks of the said supreme court; and may, in the same cases, direct the amending and correcting of such dockets, and the docketing of judgments nunc pro tunc, with the said county clerks. It was not pretended that the superior court had any power and authority in the premises, except that given by this act. Now this act, in its terms, did not require a retrospective construction; and on this account, if no other, it should not have been extended to that case. In *Johnson v. Burrell*, (2 Hill, 238,) the court say, it is a general rule that a statute affecting rights and liabilities, should not be construed so as to act upon those already existing; to give this effect, the statute should in terms declare an intention so to act. It is unnecessary to mention authorities to show the general rule that a statute will always be holden to relate to the future, unless its intention to control the past be expressly mentioned.

But the chief reason why the superior court could not lawfully have interfered with the prior lien of the bank, and the principal ground upon which the application of this law of

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1844, to the Mount Vernon Bank judgment was resisted, was, as before stated, that the court by applying that law to that judgment, would destroy a right vested in the bank. The lien of the judgment of the bank was a vested right long before the 1st day of April, 1844; the day this act was passed. On the 9th day of December, 1842, the Mount Vernon Bank acquired the right to hold a judgment, which was the first charge on the lands, tenements and chattels real of Palmer Sumner, which he had on the 9th day of December, 1842, or should thereafter acquire, and to sell such lands, &c. under their execution without interference from any creditor; and if such lands, &c. should be sold under a foreclosure, and a surplus should remain in the master's hands, to be first paid out of such surplus, to the extent of their judgment. These were absolute rights, fixed and vested in the bank on the 9th day of December, 1842, not in a state of contingency or suspension, but rights of which they could not have been deprived by any means or process known to the law before April 1, 1844. By no provision known to the law previous to that date, could Naylor's judgment have been docketed *nunc pro tunc* in the county clerk's office. There was no power in any officer or judicial tribunal to correct the dockets of the county clerk. He was an independent officer. Neither he nor any other person had the power to amend or interpolate the records in his office after the entries were once made and rights had thereby accrued. The law was imperative, without modification or saving clause. If such judgment shall not be docketed within ten days from the time when it was perfected, it shall only be a lien from the time of docketing. (*Sess. Laws, 1840, p. 334, § 26*) It is submitted, therefore, that the law requiring the docketing of judgments in the county clerk's office being absolute, and there being no power in any officer or tribunal of law or equity to docket Naylor's judgment there *nunc pro tunc*, until the act of April 1, 1844, the priority of the Mount Vernon Bank acquired on the 9th of December, 1842, became a vested right, and was a vested right when that act was passed.

But no rule of law is better known or more clearly estab-

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lished than this, that an act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right. It was so settled as long ago as Bracton. (6 *Bac. Abr.* 370, *Gwillim's ed. Stat. c.*) This great principle is explained and enforced most fully in the case of *Dash v. Van Kleeck*, (7 *John. Rep.* 477,) where Justices Kent, Thompson and Van Ness, decided that a retrospective construction cannot be given to an act of the legislature where a vested right would be destroyed thereby; and Justices Spencer and Yates dissented, not from opposition to the general principle, but because they thought the act of April, 1810, merely declaratory. (See also 1 *Kent's Com.* 455; *Beadleston v. Sprague*, 6 *John. Rep.* 101; *Dwarris on Stat.* 681; *Butler v. Palmer*, 1 *Hill*, 324; *Couch v. Jeffries*, 4 *Burr. R.* 2460; 8 *Wend. R.* 661.)

In opposition to this application to the superior court to give the act of April, 1844, a retrospective operation, it was argued, that if the doctrine maintained on the other side should be carried out to its legitimate ends, the superior court might order the bank to refund any money that might have come into their hands by virtue of their priority. Supposing this mortgage had been foreclosed before April, 1844, and a surplus then had come into the hands of Master Ruggles, the bank's priority would have been indisputable, and they would certainly have obtained the money. Would the superior court now, after the passage of the act, grant an order taking the money out of the hands of the bank? Certainly not; but they might as well make such an order as to give priority to Naylor's judgment by virtue of the act of 1844. It is believed that the superior court sustained this line of argument by granting the favor asked for, without prejudice to the rights of that class of judgment creditors in which the appellants are included. The order was drawn by the counsel for the bank, and it was stated to that counsel by the justice who signed the order, that the court had found it impossible to stretch the act of 1844 backward, so as to cover the priority of the judgment of the bank; and the counsel clearly understood that to have been the principal ground of

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the proviso in the order. It is submitted, therefore, that the superior court could not legally have given any order which would have postponed the priority of the bank to that of Mr. Naylor; and that if the language of the order which they gave be at all ambiguous (which is denied) that construction is to be adopted which supports its legality.

It is considered that the first point of the argument has been made out, viz: That the lien of the judgment of the Mount Vernon Bank against Palmer Sumner is prior in law to that of the judgment of Peter Naylor against Palmer Sumner upon the surplus moneys in this cause; because, 1. The judgment of the bank was a lien on the 9th day of December, 1842. 2. Naylor's judgment was not a lien until the 9th day of December, 1844; and 3. The order of the superior court docketing Naylor's judgment *nunc pro tunc*, as of May 20, 1842, with a proviso, does not make Naylor's judgment a prior lien; but on the contrary, expressly recognizes the priority of the bank; and the court could not lawfully have made an order which would have cut off the prior lien of the bank.

II. A court of equity can give Naylor no relief in the premises. It will not be pretended that this court can make an order directing the county clerk to amend or correct his docket of judgments, in any way. The only grounds upon which the aid of this court can be invoked, would be to show, 1. That the mistake of the county clerk was such an accident as this court can relieve against in this case, and therefore, that it should consider Naylor's judgment as properly docketed on the 20th May, 1842, and give it priority accordingly: or, 2. That Naylor's judgment was obtained upon prior equitable claims which entitle it to precedence notwithstanding the previous docketing of the judgment of the bank. The mistake of the county clerk was not such an accident as this court can relieve against in this case. His honor, the late vice chancellor of the 1st circuit, founds his order, overruling the exceptions, solely upon the point that this was such an accident or mistake as this court can relieve against. The counsel for the appellants, with great deference to the opinion of the vice chancellor, sub-

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mit that an examination of the principles and authorities will not sustain it. Before entering upon this, however, let it be premised, that the assumption of his honor, that the error in docketing occurred without any fault of Mr. Naylor or his attorney, admits of some question. It is the well known practice of many attorneys to see that judgments obtained by them are correctly docketed, and when they are sent to other counties for that purpose, it is usual to require of the clerks of those counties certificates that this duty has been performed. Had this been attended to in the present case, the error would not have occurred. The cardinal principle which controls this branch of the case is, that equity can give Naylor no relief against the express provisions of a statute. It cannot put his judgment, which was unaccompanied by the execution of an act required by law to render that judgment binding, before another judgment which followed the necessary statutory requisitions, on the ground of mistake or accident. For chancery to relieve against the express provision of an act of parliament, would be the same as to repeal it. Equity, therefore, will not interfere in such cases, notwithstanding accident or unavoidable necessity. (*Fonblanque Eq. vol. 1, p. 2, 3.*) The remedial power of courts of equity does not extend to the supplying of any circumstances, for the want of which, the legislature hath declared an instrument to be void. (*Idem, p. 54, note.*) Where a rule, either of the common or statute law, is direct, and governs the case with all its circumstances on the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it. If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation. (1 *Story's Eq. Juris.* 72.)

In *Crooke v. Bampfield*, (1 *Ch. Ca.* 227,) where a lease was bad according to the statute, the lord chancellor was called upon by a party who had strong equities, for relief. That officer said, "and the chancellor may not add to a statute to make a saving which the statute hath not made." There is a class of cases illustrating this point, in which the courts of equity in England have been called upon to give relief against the ship

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registry acts, and have declined to do so. By statute 34 Geo. 3, c. 68, § 14, it is enacted that no transfer, &c. of property in any ship, &c. made after a certain date, shall be valid or effectual for any purpose whatever, either in law or equity, unless such transfer, &c. shall be by bill of sale containing certain recitals. In *Thompson v. Leake*, (1 *Madd. Ch. R.* 39,) a sale had been made by defendants to plaintiffs, of a ship, but the provisions of the registry act had not been complied with, on account of the certificate of registry being mislaid—a pure accident and without any fraud—indeed, as much without any fault on the part of the defendants as on Naylor's part in this suit. The bill prayed that the defendants might be decreed to carry the sale specifically into execution, &c., so that the legal title might be properly passed. Sir Thomas Plumer, V. C. said: Independently of the acts of parliament, the plaintiff would be entitled to relief; but we are here tied down by positive acts of parliament, and it would be repealing the act for a court of equity to give relief in this case. In cases of accident and mistake, the court, in various instances, relieves, but will not, in the case of a defective title to a ship. The act of parliament destroys the contract when not according to the prescribed forms. A man has not, as in other cases, a contract to stand upon. So, in this case, the act of the legislature destroys the lien of the judgment when not docketed according to the prescribed forms. There is nothing for the judgment creditor to stand upon. The judgment alone gives him no specific lien; and he asks this court not to mend a claim which he once had, and which by accident has been broken, but to give him a new one, such as he never possessed. If this court grants the request, it will effectively repeal the docketing act of 1840. (*See also Thompson v. Smith*, 1 *Madd.* 401; *Mestaier v. Gillespie*, 11 *Ves.* 621, 627; *Curtis v. Perry*, 6 *Id.* 739; *Rolleston v. Hibberd*, 3 *Broom's Ch. Ca.* 571.) There have been similar decisions under the annuity acts and the stamp acts. (*See Toulmin v. Price*, 5 *Ves.* 540.) In *Davis v. The Earl of Strathmore*, (16 *Vesey*, 419,) the ground upon which the court refused relief to a purchaser who had notice of a prior unregistered

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judgment, was that he had notice of the previous judgment. Mr. Sugden, in commenting on the case, says: If a purchaser has notice of any judgment, the statute does not in equity extend to him; as he is already in possession of what the legislature intended to furnish him with. (*Sugden on Vendors*, 675.) This case of *Davis v. The Earl of Strathmore*, which seems to be the strongest in the books, has no weight against the appellants here; because, in the first place, we conceive the New-York statute of 1840, to be as extensive and sweeping in its phraseology as the English ship registry and annuity laws, and therefore not to be included among those acts, which, according to Lord Eldon, may be relieved against in chancery. It will be seen by comparing the New-York statute with the 4 and 5 W. & M. c. 20, and the other English acts, how much more general and extended is the language of our law. In the second place, the sole element which gave the court jurisdiction in the case in Vesey, to wit, the notice, is wanting here. It appears by the testimony in this case, that neither the appellants, nor their solicitor, nor any person on their behalf, had any notice whatsoever of this judgment of Naylor's against Sumner, until the thirteenth day of November, 1844, and a long time after their own judgment was docketed; but, on the contrary, had fully believed, up to that time, that they were the prior judgment creditors, and had acted accordingly.

The construction given by the respondent to the statute of 1840 seems to be entirely unwarranted, to wit: that it was made for the protection of bona fide purchasers and incumbrancers only. It was undoubtedly made for the protection of creditors also. As it required judgments to be docketed in a particular county before execution could issue there, it furnished means for business men to examine into the affairs of their debtors before granting them credits. The court found great difficulty in claiming jurisdiction in *Davis v. The Earl of Strathmore*, where ample notice of the judgment was proved. How can the court pretend to jurisdiction here, where no such notice is shewn?

In respect to the registry of mortgages, the language of the

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court of equity is, it is the duty of the incumbrancer to see his mortgage duly registered, or equity will not assist him. (*Frost v. Beekman*, 1 *John. Ch. Rep.* 299.) See also the case of *Asst. v. Wells*, (4 *Wheat.* 466,) which is very strong on this point. It must be remembered, in considering this branch of the case, that judgments are statutory not equitable rights. Judgments are statutory liens rather than liens in equity. The remedies of creditors in respect of them are derived under act of parliament. (*Cross' Law of Lien*, 101.) Naylor was entitled to no preference in chancery because he obtained his judgment at an earlier day than the bank. One judgment creditor has an equal right with another, before this court, so far as the mere time of obtaining a judgment is concerned. Other things being equal, all judgment creditors, in the eye of a court of equity, are entitled to the same favor. If one of them shows a judgment fortified by all the legal formalities required to give it a lien, and the other a judgment unaccompanied by these, equity can have no choice: it must give the preference to the former.

Again; Naylor having applied to the court, from which the judgment issued, to have it docketed nunc pro tunc, and that court having decided not to grant the relief so far as to give him a preference over the appellants, he must be bound by that decision, and can get no relief in equity. The case of *Brinkhoff v. Marvin*, (5 *John. Ch. Rep.* 320,) is in point here. In that case the judgment creditors had discussed their respective rights as to priority, before the supreme court, and that court had made an order settling their rights. The chancellor, therefore, held that the decision of the supreme court was conclusive. The mistake of the county clerk was not such an accident or mistake as a court of equity can relieve against, in this case.

Naylor has no prior equitable claims which are to be preferred to the judgment of the appellants; and therefore the appellants having the legal right, will prevail. We are aware of the decision of this court, *In the matter of Howe*, (1 *Paige's Rep.* 125,) that judgment creditors have no preference over prior equitable claims against the estate of a debtor. And also in *White v. Carpenter*, (2 *Paige's Rep.* 219,) that the general

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lien of a judgment is controlled by equity, so as to protect the rights of those who are entitled to an equitable interest in the lands, or in the proceeds thereof; and in other cases to the same effect. In considering this branch of the case it is submitted, that if Naylor ever had any specific, equitable lien, that lien has now become merged in a legal lien, and must be governed by strict legal rules. It would seem that whatever equitable rights Naylor may have had against this real estate, he merged them in legal ones, by taking a judgment against Sumner, which has been made by order of the court a lien on all his real estate. The maxim *æquitas sequitur legem*, controls this case. How can Naylor insist upon equitable claims against Sumner, when he has a complete remedy at law? Both parties have put their claims in the shape of legal judgments: the law has given both certain liens on Sumner's real estate. Will equity extend and modify those liens? Mr. Naylor made his election, and exchanged whatever equitable rights he held, for certain fixed legal rights. His remedy was complete in a court of law. Equity has nothing to do but to ascertain the legal rights of the parties, and decide accordingly. In *Codwise v. Gelston*, (10 *John. Rep.* 507,) Chief Justice Kent says, if a fund for the payment of debts is created under an order or decree in chancery, and the creditors come in and avail themselves of it the rule of equity then is, that they shall be paid in *pari passu* or upon a footing of equality. But when the law gives priority equity will not destroy it; and especially where legal assets are created by statute, as the judgment lien was here, they remain so, though the creditors be obliged to go into equity for assistance. (2 *Fonb.* 403, 404.) The legal priority will be protected and preserved in chancery. See also *Plunket v. Pinson*, (2 *Atk.* 290.) The only ground upon which Naylor can have a prior equitable lien must arise from considering the real estate mortgaged as partnership property, which it was not. Merely obtaining a judgment at an earlier day gives Naylor no priority in a court of equity, as was just now shown. If this equitable claim of Naylor's amounts to any thing, it is such an one as would have given him a priority to the judgment of the

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bank, even if he had never taken a judgment himself against Sumner.

It is contended on the other side that each partner has a lien upon the whole of the partnership property, for the payment of the partnership debts. But this real estate was not partnership property. It was not considered to be such by the partners themselves. It was not property used in the business of the firm—in the tin-plate working business. The only connection whatever it had with the partnership was, that it was taken for a partnership debt. It was conveyed to Sumner & Naylor as tenants in common. It does not appear that it was conveyed to them in their partnership name. That they did not consider it partnership property, is evident from the agreement at the dissolution of the partnership, as stated by Mr. Naylor in his affidavit. The intention was to divide all the partnership property. No division of this was made. It was understood to be already divided, and held by each partner as private property. If the debts receivable are not sufficient to pay the debts payable, Sumner is to be personally bound for half the overplus. Not a word is said as to the real estate. The business of the concern was closed, and if the whole real estate was to have been at the disposal of Naylor, would not that have been specially agreed upon? The clear inference is, that they themselves understood that each held an undivided half of this property, as his own private property, without being subject to the control of the other in any way whatsoever. Again; if it were partnership property in their eyes, the taking of the judgment as security for the advances, was clearly unnecessary, so far as the land was concerned. It would have been bound without the judgment. The judgment, Naylor swears, was intended as security. If by this, he meant to obtain a lien on Sumner's part of the Crosby-street and Eleventh-street property, it was a clear recognition that it was individual property. What seems fully to settle this question is this, that Mr. Naylor, in his affidavit on the reference, claimed to be entitled to one half part of the surplus, as owner of the fee of one half part of the mortgaged premises, proved his claim as such before the

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master, and has already received the half of such surplus moneys under an order of this court. He claimed the other half by virtue of a judgment. He thus clearly recognizes a tenancy in common in this real estate, without pretending to any lien on the same as a partner. But even if this property had been purchased with partnership funds, for the purpose of being used in partnership affairs, it would still be regarded as the individual property of the partners; and equity would not apply it to pay partnership debts, in the absence of an express agreement between the partners to consider it as partnership property. This important principle is clearly stated by his honor the vice chancellor of the first circuit, in the case of *Smith v. Jackson*, (2 *Edw. Ch. Rep.* 28,) where it was holden that if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid out of their joint funds and to be used for partnership purposes, it will be deemed real estate. In that case, the case of *Coles v. Coles*, (15 *John. Rep.* 159,) is commented upon, and the doctrine established therein to the like effect by the supreme court confirmed. And in respect to this case, and that of *McDermot v. Lawrence*, (7 *Serg. & Rawle*, 438,) his honor says that they go to show, in the absence of any such agreement, that the lands purchased and held by a partnership, even for the purposes of the firm, will, as between the representatives of the real and personal estate of a deceased partner, and between the creditors of the firm and a separate creditor who has acquired a lien by mortgage or otherwise upon the individual share of one partner, in good faith, be considered as real estate, both in law and equity. So in commenting upon the case of *Winslow v. Chiffelle*, (*Harp. Eq. Rep.* 25,) his honor acknowledges the propriety of the doctrine that joint creditors have a lien on lands where the lands have become partnership property. Yet, I think, he continues, lands can only be rendered so, by some express agreement and understanding of the several partners, and not merely by purchasing with joint funds and taking the title in their joint names. No agreement of the sort required in these decisions exists in the present case.

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The land was conveyed to satisfy an old partnership debt, and the title stands in the individual names of the partners. This is all. It was not even used for partnership purposes. As before shown, it seems to have been expressly recognized as individual property. At any rate it is clear, upon the authority of these decisions, that it can never be pronounced partnership property. It follows then, that Naylor has no prior equitable claims against this real estate, which are to be preferred to the judgment of the appellants, and that, as Naylor has no such superior equity, the appellants having the legal right must prevail. And upon this ground, and because the mistake of the county clerk was not such an one as this court can relieve against, in this case, it is considered that the second point of the appellants has been made out, to wit: that a court of equity can give Naylor no relief in the premises.

III. The appellants have certain equities which entitle them to the favorable consideration of this court. It appears by the affidavit filed with the master, that the appellants having made all the usual and necessary inquiries, by inspection of original searches and otherwise, to ascertain their lien upon Sumner's real estate, and arrived at the full belief from such examination that they were the senior incumbrancers by judgment upon the same, and without any notice of the Naylor judgment, and trusting that the Eleventh-street property would yield a surplus, omitted to bid upon the Crosby-street property to its reasonable value, and allowed it to be bought in by Mr. Naylor for \$8000, when it was worth \$10,000. By so doing, and by omitting to bid upon the Eleventh-street property to its full value, they suffered these estates to be sold for a much less sum than they would have otherwise brought. Whereas, if they had not been impressed with the belief of their priority, they would have taken such measures as to have caused the real estate to bring a sufficient sum to satisfy all the incumbrances by mortgages and Naylor's judgment, and leave a surplus for themselves: or at any rate, a sufficient sum to reduce Naylor's judgment very considerably, and thus increase the value of their own lien upon Sumner's remaining real es

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tate : and it does not appear but that Sumner has other real estate to be affected by these judgments.

In estimating the equities in this case, this fact, also, is an important one, that Naylor, through the confidence on the part of the appellants in their superior lien, and their ignorance of his judgment, was enabled to purchase Sumner's share of the equity of redemption in the Crosby-street property for \$1000 less than its actual value, since Naylor paid only \$8000 for what was worth \$10,000 : that is to say, he has actually saved an amount equal to the sum in controversy in this cause, through this confidence on the part of the appellants in their priority. It appears also, that chiefly on account of this confidence in their priority, the appellants have incurred considerable expense in various suits and proceedings, for counsel fees and otherwise, which they would not have otherwise incurred ; a large part of which were incurred before they had any notice whatever of Naylor's judgment. All these circumstances give to the appellants a strong claim to the equitable consideration of the court, and an equitable priority ; particularly if the language of this court in *Frost v. Beekman*, (1 John. Ch. Rep. 299,) should be applied to judgments.

Mr. Naylor, in this case, ought to have taken care to have his judgment properly docketed ; and if by his omission to do so, injury happens to other parties, they are to be protected by this court. It is to be considered also, that Mr. Naylor has a perfect right of action against the county clerk, for any injury he may sustain from the misfeasance or omission of that officer.

These considerations entitle the appellants not only to their costs and expenses in the premises, but also to an equitable priority in the distribution of the surplus fund. The appellants therefore ask for an order reversing the order of the vice chancellor with costs, and allowing the exceptions to the master's report, and directing that the clerk of the first circuit pay over to the president, directors and company of the Mount Vernon Bank, or their solicitor, all the surplus moneys remaining in court to the credit of this cause ; first deducting therefrom the commissions to which the clerk is by law entitled.

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H. Holden & J. T. Brady, for the respondents. The first proposition of the learned counsel for the appellants is, that the lien of the Mount Vernon Bank upon the surplus moneys in this cause is prior in law to that of Peter Naylor. The first consideration that presents itself here is this: What shall constitute the ground of priority? The counsel for the bank says, the date of the docket of the judgment, as it appears on record. We say, the date of the actual entry of the judgment. This is not a proceeding in which a bona fide purchaser or mortgagee seeks to enforce a lien of record against one set up that is not of record. There is a fund in court to be distributed or paid out to him or them who shall show the earliest right to it. The well known maxim applies here, *qui prior est tempore, potior est jure*. What gives either the bank or Mr. Naylor any right to claim this surplus money? Not that he has procured an entry of a judgment to be made on the docket; for this would avail nothing if there was not a legal judgment equitably due. It is therefore the judgment which gives either claimant the substantial right to payment out of surplus money. Naylor having the first judgment, is clearly entitled to be paid first, unless this right be taken away by some statutory provision. Is there any such provision?

The counsel for the bank insist that the various statutes cited by them give the priority of lien to the judgment creditor whose judgment was first docketed, though its rendition be subsequent to that of the one it is made to supersede. We answer, that all those statutes are intended for the protection of bona fide purchasers or incumbrancers, who might be defrauded if their deeds or mortgages, taken in good faith, should be exposed to the danger of postponement to a judgment never recorded, so as to give notice of its own existence. None of the statutory provisions apply to a case like this, where a subsequent judgment creditor seeks to obtain priority of a former, because of a mistake, of a public officer, which has done such subsequent creditor no injury. It is not shown, nor is it pretended, except by way of argument, and no fact is adduced to show, that, the Mount Vernon Bank gave credit to Sumner

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because there did not appear to be any judgment recorded against him. Even if this had been proved, it could not, as we submit, alter the case here; for, as we shall presently show, under another branch of this argument, the loss of the bank, if any, would, even in the case supposed, be one for which neither law nor equity affords redress. We have, then, the Mount Vernon Bank claiming precedence of Mr. Naylor, because the public officer, whose duty it is supposed to be to see his judgment properly docketed in the county clerk's office, transposed the christian and surname of Palmer Sumner, putting the former first instead of the latter; and because the christian name had priority in the docket, the bank claims priority in the distribution of this fund.

If the court should consider that the claimants here are entitled to priority, not according to the dates of their judgments, but of the dockets of the same, we submit two propositions to protect us from postponement: 1st. That our judgment was in fact docketed before that of the bank; 2d. That if it were not so docketed in fact, the order of the superior court gives it its legitimate place on the record. The act provides, that no judgment shall, after the passage of that law, be a lien upon real estate, unless docketed in books to be provided and kept for that purpose by the clerk of the county where the lands are situated. When shall the judgment be considered as docketed, so far as the rights of the judgment creditors are concerned? We answer, when the transcript of the judgment has been delivered to the county clerk. It is not the duty of that creditor to see that the public officer does his duty. The opinion of Chancellor Kent, in the case of *Frost v. Beekman*, (1 *John. Ch. Rep.* 288,) cited by the learned counsel, has no application to the new system of dockets. It can hardly be the duty of a judgment creditor to have a special agent in every county to see that a judgment is properly docketed. If, by the omission of the clerk, a subsequent purchaser, or mortgagee, in good faith, is injured, and the question arises between two innocent persons as to who shall bear the loss, the mortgagee or grantee being without blame, the loss will be cast upon the judgment cred-

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itor who by abundant caution might have had the docket correctly made. But when advantage is sought to be taken of this omission, by one who merely has the luck of appearing first on the record of judgments, he cannot be permitted to profit by the mistake which assigns him an unjust precedence.

How must the judgment be docketed in point of form? The counsel for the bank thinks that the surname should appear first in order. This has been the practice; but the law does not make it necessary. We insist, therefore, that as between the bank and Naylor, the judgment was sufficiently docketed when the transcript was filed, to prevent one from using or the other gaining by an error which neither had any reason to anticipate. Again; the order of the superior court has secured us our deserved precedence. A motion was made to the superior court to have the judgment of Naylor v. Sumner docketed nunc pro tunc, as of the time when it should have been entered. On the hearing of that motion, the counsel for the bank set up the same equities upon which he now relies. The answer to this branch of his opposition to the motion was, that the superior court was merely called upon to correct the error of a public officer, and not to consider the equities suggested in opposition to that action; and if there were equities, that they would be disposed of in this court. The counsel now argues, that our having moved the court for this relief is evidence that the judgment was not docketed. This is not logical. It is only evidence that we did not consider it docketed. This court might declare that the motion in the superior court was wholly unnecessary. This is indeed the opinion of the respondents' counsel now. They submit that equity will, where no injury would result from a contrary course, give preference to claims according to their real and not their apparent priorities; preferring the substance to the shadow. The statute, (*Laws of 1844, p. 90, § 7.*) gives the superior court power, in express terms, to direct the docketing of judgments nunc pro tunc with the county clerk. And the court will find, on reference to the case of *Butler v Lewis*, (10 *Wend.* 541,) that while great care has been taken not to permit such an amendment, to the detriment

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of a bona fide purchaser, yet it has been liberally allowed in correcting errors of public officers. (*See 2 R. S. 425; 1 Petersd. Abr. 571, 2.*) To maintain his case in this respect, the counsel takes the bold ground that the statute of 1844 would operate to destroy vested rights, if used to effect the end sought by Naylor in this case. He refers to many authorities on this head. But we submit that the answer to his argument and law here, is, that the bank never had a vested right to take precedence of the prior judgment of Naylor. If the bank gained precedence by the mere accidental priority of date in docket, the action of the superior court could not, perhaps, remove it. But in all the cases where statutes have been restrained from retroactive operation upon vested rights, those rights have been such conventional, or equitable rights arising from contract, as could not without injustice be taken away. (*3 Story's Comm. on the Const. 266. 1 Kent's Comm. 413. Charles River Bridge v. Warren Bridge Company, 11 Peters' Rep. 420.*) We think, therefore, that in every point of view our case may be considered free from the objections ingeniously urged by our learned opponents. All the provisions of the various statutes cited by the counsel for the appellants relate exclusively, and are intended to relate, only to liens upon real estate, *eo nomine*, and not to the adjustment of equitable claims to money in the court of chancery. For, though we are well aware that a court of equity will sometimes regard money as real estate, that nice rule is only enforced for the preservation of substantial rights, and the promotion of substantial justice. In this case it cannot be pretended that as to the mere judgment of the bank, any thing has been shown to give it any preference over that of Naylor.

The learned counsel next insists that Naylor has no prior equitable claim to be preferred to the legal lien of the Mount Vernon Bank, which must consequently prevail. So far from admitting this proposition, we insist that even if Naylor had not obtained a judgment, he would yet have an equitable claim to the surplus, in this case, superior to the legal claim of the bank. No rule is better settled, and particularly in the court

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of chancery, than that partnership property is regarded as a fund for the payment of partnership debts; and any appropriation of it to satisfy claims against one of the firm, while partnership debts exist, is strongly discountenanced. The cases cited below are very conclusive on this point, and show that Naylor, as the copartner of Sumner, has a clear right to the moneys in controversy. (*Hutchinson v. Smith*, 7 Paige, 72.) In the first place, the moneys represent partnership property—are the proceeds of it. In the next place, Naylor's judgment is for payments made to creditors of the firm of Sumner & Naylor over and above all the assets of the firm, and his proportion of such debts. He therefore is subrogated to the creditors whose claims against the copartnership he satisfied, and has the same right to this fund which they would have if they had not been paid. That right would be superior to the judgment of the bank, though it had been docketed years before its actual entry. The case of *Hutchinson v. Smith*, cited above, sustains this position. The counsel seeks to avoid the effect of this argument by insisting that the prior equitable claim of Naylor, if any existed, has been merged in the judgment obtained against Sumner. This is again too technical for a court of chancery, engaged in determining the priority of equities. The judgment, so far from extinguishing, only strengthens, while it represents the equity of Naylor. It is then sought to prove that this is not copartnership property, but real estate, held by Sumner & Naylor as tenants in common. That real estate may be owned by partners, as such, is not questioned by our opponent. Nor do we question the doctrines of his honor the vice-chancellor, as expounded in *Smith v. Jackson*, (2 Edw. 28.) But we have yet to learn that a house and lot conveyed to two persons who are copartners, to pay a copartnership debt, will not be regarded at law and in equity as copartnership property, to which the creditors of the firm have the first claim. The argument of the appellants' counsel on this subject cannot be considered sound, especially when they suggest that the nature of the claim made by Naylor to the surplus moneys in this case, as owner of one half of the fee of the property sold, shows that this was real

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estate and not copartnership property. When the firm of Sumner & Naylor became insolvent, the real property, of which the money in court is the surplus proceeds, was clearly liable to the payment of the partnership debts. (*Deveau v. Fowler*, 2 Paige, 400. *Payne v. Matthews*, 6 Id. 19. *Hutchinson v. Smith*, 7 Id. 26. *Dale v. Halsey*, 16 John. Rep. 34. *Story on Part.* § 363. 3 *Kent's Com.* 64. *Everingham v. Ensworth*, 7 Wend. 326. *Egbert v. Woods*, 3 Paige, 517.)

The third proposition of the learned counsel for the bank is, that the bank have equitable claims which entitle it to a preference. The first observation to be made on this point is, that the equitable claims spoken of all arose after the docketing of the judgment of the bank. There is no pretence that, as to any thing preceding the judgment, or connected with the judgment itself, there was any circumstance conferring upon the bank any peculiar claim. What are the equitable claims arising since the judgment? Supposing that there was no judgment prior in date, the bank appeared in the chancery suit. Under the same impression it permitted the Crosby street property to be bid off by Naylor for \$8000, when it was worth \$10,000. As to both these circumstances we would observe, that there are many cases in which a party, acting upon a supposed state of facts, may incur a liability or disregard an advantage, where the law will afford him no redress or compensation, though the error be one into which he is innocently misled. An unrecorded mortgage will take precedence of a judgment, (*Jackson, ex dem. Tuthill, v. Dubois*, 4 John. 216,) and yet the party purchasing a judgment at an assignee's sale of the effects of a bankrupt debtor, could not be relieved on the discovery of a mortgage prior to the judgment. A purchaser at a sheriff's sale, who had searched the records and found no judgment against the defendant in the execution, except the one on which that execution issued, can have no redress, if it turns out that the property, the right, title and interest of the defendant in which he had purchased, had before been sold for assessments, though the deed was unrecorded. Indeed, in almost every instance of the purchase of real estate, the purcha

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set is in danger of losing his title by some unrecorded conveyance, or fraud in a will or deed, or a mistake in family history, by which the existence of some heir at law may be concealed or denied. All that can be said of the complaint of the Mount Vernon Bank in this case is, that it was conceived to be in a position more favorable than really existed. This error can operate neither to the benefit of the bank or the injury of Mr. Naylor. And as to the allegation that Naylor was permitted to buy in the Crosby-street property at less than its value, if that be the case, the bank has acted inconsiderately. There is no pretence that Naylor knew he bought at less than the highest price that could have been fairly obtained at the sale.

In conclusion, we would submit another view of this matter. The act requiring transcripts to be filed in the county clerk's office, introduces an entirely new system. The learned counsel for the bank takes it for granted that the error in docketing the judgment of Naylor is chargeable upon the clerk of the county. Why is this? If it be true that the surname of the judgment debtor should stand first, it is the business of the clerk who makes the transcript to put it in that order. What is the transcript? An exact copy of the record as it appears in the book transcribed. From this two results follow: *First*, that the error, if any, was committed by the clerk of the superior court. And, *secondly*, that the counsel for the bank should have made search in the superior court where the judgment was originally entered. Whether, then, Mr. Naylor be considered as claiming under his prior judgment, or as a creditor of a copartnership, against a copartnership fund, he is, in either case, entitled to the surplus moneys in court.

THE CHANCELLOR. Previous to the revised statutes, a judgment in a court of record, in this state, was a lien upon the lands of the judgment debtor from the time of the entry of such judgment; whether docketed or not. But, by the statute then in force, if the judgment was not properly docketed, it did not affect the lands of the judgment debtor, as against subsequent purchasers or mortgagees. (1 R. L. of 1813, p. 501, § 3.) Even

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as to them, however, the undocketed judgment was entitled to priority, in equity, if the purchaser, or mortgagee, had notice of its existence at the time of his purchase, or when he took his mortgage. (*Davis v. The Earl of Strathmore*, 16 *Ves. Rep.* 420.) That statute made no provision for priority in favor of the lien of subsequent judgment creditors. The first judgment, although not docketed, was therefore entitled to a preference, over the lien of a junior judgment, which had been docketed as directed by the statute. But if the land of the debtor had been sold, by the sheriff, under an execution upon the junior judgment, to a purchaser who was ignorant of the existence of the prior undocketed judgment, such purchaser took the land discharged of the lien of the undocketed judgment.

The revised statutes, however, have made a very material alteration in the law relative to the liens of judgments. For the 12th section of the title in relation to judgments, (2 *R. S.* 360,) declares that no judgment shall affect any lands, tenements, real estate, or chattels real, or have any preference as against *other judgment creditors*, until the record thereof shall be filed and docketed, as therein directed. The effect of this provision of the revised statutes appears to be, to prevent the common law lien of the judgment from attaching at all upon the real estate of the judgment debtor until the judgment has been docketed; and not merely to protect bona fide purchasers and incumbrancers, who had no notice of the existence of the judgment when their interests in, or liens upon, the real estate of the judgment debtor accrued. The provisions of the act of the 14th of May, 1840, on this subject, are also in accordance with this construction of the revised statutes. For the 25th section of that act declares, that no judgment, or decree, which shall be entered after that act takes effect, shall be a lien upon real estate, unless the same shall be docketed, in books to be provided for that purpose, by the county clerk of the county where the lands are situate.

This court may enforce an equitable lien, either upon a legal or an equitable estate in lands. And where the common law, or a statute, creates a lien upon a legal interest in land, this

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court, by analogy, sometimes declares and enforces a similar lien upon an equitable estate. But where the lien is created by statute, and the lien itself, as well as the estate against which it is sought to be enforced, is purely legal, this court is not authorized to extend the lien to cases not provided for by the statute. Judge Lane, in delivering the opinion of the supreme court of Ohio, in the case of *Douglas v. Huston*, (6 *Ohio Rep.* 162,) says, the existence, validity, and extent of a judgment lien, in that state, are matters purely legal, dependent upon statutory provisions; and that if the lien fails at law, it cannot be aided in equity. And in *Mower v. Kipp*, (6 *Paige*, 88,) this court decided that it could give effect to the lien of a judgment, as against subsequent purchasers and incumbrancers, upon a legal title, only so far as the lien could have been enforced by execution at law.

The fact that the error in the docketing of the respondent's judgment, in the office of the clerk of the city and county of New-York, was the error of the clerk, and not the error of the judgment creditor, or of his attorney, does not therefore authorize this court to interfere to deprive another judgment creditor of his legal priority; if he has obtained one by such error of the clerk. The case of *Landon v. Ferguson*, (3 *Russ. Ch. Rep.* 349,) was similar to the case now under consideration, in this respect. There the judgments had been carried into the proper office to be docketed, but from some mistake of the officer the dockets were not completed. The judgment creditors claimed a preference, over other creditors of the decedent, in the distribution of his estate upon a creditor's bill. But as the judgments had not in fact been docketed, Lord Gifford decided that the holders of the judgments were not, even in equity, entitled to a priority. (See also *Braithwaite v. Watts*, 2 *Crompt. & Jerv. Rep.* 318.)

Upon an examination of the statute, I think the counsel for the appellant is also right in supposing that the respondent's judgment was not duly docketed; so as to entitle it to a priority upon that ground. The revised statutes direct the clerk of the court in which the judgment is recovered, upon the filing of

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the record, to docket the judgment. And they also prescribe the particular manner in which it is to be done. The clerk is to enter, *in an alphabetical docket*, in the books to be kept for that purpose, a statement, containing the names at length of all the parties to the judgment, the amount of the debt, or damages, with the costs, and the hour and day of entering such docket. And if the judgment is against several persons, such statement must be repeated under the name of each person against whom the judgment was recovered, in the *alphabetical order* of their *names* respectively. (2 R. S. 361, § 13.) The act of May 14th, 1840, requires the clerk of the county where the lands are situated, upon the filing of the transcript in his office, to docket the judgment in the manner prescribed by law. And, in addition to the requirements of the revised statutes on that subject, the county clerk must specify the court in which the judgment mentioned in such transcript was recovered, and the day and hour on which the judgment was perfected; as well as the time of the docketing of the judgment by him. (*Laws of 1840*, p. 334, § 26.) The statute does not declare, in express terms, that the judgment shall be entered, in the alphabetical docket, under the letter corresponding with the surname of the judgment debtor. But such has been the practical construction which has been given to the statutes on this subject for more than a century; and it is the only mode in which a judgment can be docketed so as to enable a subsequent purchaser, or incumbrancer, by a search in the clerk's office, to ascertain whether there is an existing lien, by judgment, upon the real estate of the judgment debtor. In the present case, therefore, the docketing of Naylor's judgment under the letter P, which was the initial letter of the christian name instead of the surname of Palmer Sumner, the judgment debtor, was not even a substantial compliance with the requirements of the statute.

The rights of the parties to the surplus moneys in controversy, were in no wise affected by the order of the superior court, to amend the docket of the respondent's judgment *nunc pro tunc*. Before that order was made, the mortgaged premises had been sold and conveyed by the master; and the surplus

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moneys had been brought into this court. So that if the superior court had the power, under the act of April, 1844, (*Laws of 1844, p. 92, § 7,*) to order a judgment to be docketed nunc pro tunc, so as to give it a priority, as a lien upon real estate, over an intermediate judgment, it could not give a lien upon real estate which had been sold and conveyed, under a decree upon a prior incumbrance, long before that order was made. Besides, the order itself, in substance, provides that the docketing of Naylor's judgment, nunc pro tunc, shall not prejudice the rights of those whose judgments had been duly docketed subsequent to the recovery of his judgment, and before the entry of that order.

The other ground, however, upon which the counsel for the respondent base his claim to an equitable priority, in reference to the surplus proceeds of the mortgaged premises in this case, appears to be sufficient to sustain the order appealed from. It is a settled principle of the law of partnership, that the partnership effects are to be applied in the first place to the payment of the debts of the firm, and to equalize the claims of the different copartners in relation to the fund. In other words, the separate estate or interest of a copartner in any of the partnership property, is only his share; of that part of the copartnership effects, or of the proceeds thereof, which remains, after the debts of the firm, and the demands of his copartners, as such, are satisfied. And if one of the copartners has paid more than his share of the partnership debts, he has a claim upon the partnership property, which claim in equity is paramount to the claims of the separate creditors of his copartner. (*Taylor v. Fields, 4 Ves. 396. Ex parte King, 17 Idem, 115. Christian v. Ellis, 1 Grat. Rep. 396. Nicholl v. Mumford, 4 John. Ch. Rep. 522.*) In the cases *Smith v. Haviland & Field*, and of *Deveau v. Fowler, (2 Paige's Rep. 400,*) this court held that an assignment, by one of the partners, or by his personal representatives, of his or their interest in the surplus, was not a relinquishment of the equitable claim to have the debts of the firm paid out of the copartnership funds, where the rights of bona fide purchasers were not involved.

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In reference to real property, conveyed to the partners for the benefit and use of the firm, or received in payment of debts due to the copartnership, it is perfectly well settled, both here and in England, that the legal title vests in the grantees thereof, as in an ordinary conveyance of real estate. Thus at the common law, if land was purchased with copartnership funds, for partnership purposes, and was conveyed to all the partners, generally, in fee, it would at law create a joint tenancy; so that neither could convey any more than his share of the land during the lives of his copartners. And upon the death of either of the partners, without having severed the joint tenancy by a conveyance, the legal title to the whole of the land would survive to the other copartners. But under the statutes of this state relative to joint tenancies, the several copartners, to whom such a conveyance was made, would become tenants in common of the legal title. And upon the death of either, the undivided portion of the legal title thus vested in the deceased partner, would descend to his heirs at law; without reference to the equitable rights of the several copartners in the land as a part of the property of the firm. The law is the same in England where the conveyance is made to the several copartners *as tenants in common*; or where there is any thing, upon the face of the deed, showing that it was not intended to create a joint tenancy, but only a tenancy in common in the property. And I believe it is not disputed any where, that a bona fide purchaser, or mortgagee, who obtains the legal title to partnership lands, or to an undivided portion thereof, from the person who holds such legal title, and without notice of the equitable rights of others in the property as a part of the funds of the copartnership, is entitled to protection in courts of equity as well as in courts of law. But questions have frequently arisen, both in this country and in England, concerning the equitable rights of the copartners, or their representatives, in such property, as between themselves; and also as between the heirs at law and the personal representatives of a deceased copartner.

Where real estate is purchased with partnership funds, for the use of the firm, and without any intention of withdrawing

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the funds from the firm for the use of all or any of the members thereof as individuals, I believe it has never been doubted in England, that such real estate was, in equity, to be considered and treated as the property of the members of the firm collectively; and as liable to all the equitable rights of the partners as between themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those who are beneficially interested in the fund; not only during the existence of the copartnership, but also upon the dissolution thereof by the death of some of the copartners or otherwise. (*Lake v. Craddock*, 3 Peere Wms. 158. *Smith v. Smith*, 5 Ves. 189. *Watson on Part.* 72. *Gow on Part.* 48, 288. *Story on Part.* 128, § 93. 1 *Story's Eq.* § 674.)

Another question has arisen, in relation to real estate as copartnership property, respecting which there has been a great conflict of opinion in England. That question is, whether real estate of a copartnership, upon the death of one of the copartners, and after the debts have been paid and the equities adjusted between the several members of the firm, belongs, in equity, to the executor or administrator of the decedent, as a part of his personal property; or whether the beneficial interest, as well as the legal title, in the decedent's share of such real estate, descends to the heirs at law. In the case of *Thornton v. Dixon*, (3 Bro. Ch. Ca. 199,) Lord Thurlow, upon the first argument, inclined to think the interest of the deceased partner must, in equity, be considered as a part of his personal property; and that it should go to his personal representatives. But upon a second argument, he changed his opinion, and decided that, in the absence of any agreement that the land should be converted into personalty at the termination of the partnership, it belonged to the heir, as real estate. That decision was followed by Sir William Grant in *Bell v. Phyn*, (7 Ves. 453,) and in *Balmain v. Shore*, (9 *Idem*, 500.) But these decisions were subsequently overruled by Lord Eldon in *Townsend v. Devaynes*, (*Mont. on Part. App.* 97.) And it may now be considered as the general rule in England, that real estate

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belonging to the firm, unless there is something in the partnership articles to give it a different direction, is to be considered, in equity, as personal property; and that it goes to the personal representative of the deceased partner who was beneficially interested therein. (*Selkrigg v. Davies*, 2 *Dow's P. C.* 231. *Phillips v. Phillips*, 1 *Myl. & Keen*, 649. *Broom v. Broom*, 3 *Idem*, 443. *Houghton v. Houghton*, 11 *Sim. Rep.* 491. *Morris v. Kearsley*, 2 *Young & Coll. Rep.* 139.) In a very recent case, however, Lord Langdale appears to have departed from this general rule, where the copartners, after the termination of the copartnership, continued to treat the property, which had been purchased by the firm, as real estate, by renting it to a new firm. He there held, that upon the death of one of the members of the old firm, his beneficial interest in the real estate, as such copartner, was, in equity, to be considered as real estate; and that it belonged to his heir at law (*Rowley v. Adams*, 7 *Beav. Ch. Rep.* 548. See also *Randall v. Randall*, 7 *Sim. Rep.* 271.) And in a still later case, the court of common pleas, in England, decided that real estate conveyed to trustees for the use of a copartnership, was to be considered as giving the several members of the firm an equitable freehold therein, to the extent of their respective shares in the copartnership stock, so as to entitle them to vote as freeholders; although the trust deed declared, in express terms, that the lands conveyed thereby should be considered in the nature of personal, and not as real estate. (*Baxter v. Newman*, 1 *Lutw. Regist. Cas.* 287.) But in that case, Chief Justice Tindall, who delivered the opinion of the court, distinctly recognizes the principle that a court of equity will deal with real property as if it was personalty, so far as is necessary to carry the intention of the copartners into execution.

The American decisions in relation to real estate purchased with partnership funds, or for the use of the firm, are various, and conflicting. But I think they may generally be considered as establishing these two principles: *First*, that such real estate is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copart

ner to another upon the winding up of the affairs of the firm. *Secondly*, that, as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate.

In *Smith v. Jones*, (3 *Fairf. Rep.* 337,) Judge Emery recognizes the principle that real estate, purchased with copartnership funds, is in equity to be treated as part of the effects of the firm. In a subsequent case, *Blake v. Nulter*, (1 *Apple. Rep.* 19,) Weston, C. J. doubted whether this principle was not to be controlled, in the state of Maine, by statute. But in *Dudley v. Littlefield*, (8 *Shep. Rep.* 422,) it was held that there might be a copartnership in the purchase and sale of real estate; although different rules prevailed in that case, in relation to the transfer of the title, from those which were applicable to personal property owned by the firm.

In *Pitts v. Waugh*, (4 *Mass. Rep.* 424,) the supreme court of Massachusetts decided that a man could not be charged as a dormant partner in a firm for the buying and selling of land; and that the law merchant did not extend to such a case. In the subsequent case of *Goodwin v. Richardson*, (11 *Idem*, 469,) the same court decided that where lands were mortgaged to a mercantile firm, for the security of a debt, and the copartners afterwards entered for non-payment, so that the equity of redemption was extinguished according to the law of that state, the moiety of the land, upon the death of one of the copartners, descended to his heirs at law; and that the surviving partner had no claim to payment out of the proceeds of that moiety of the land, in preference to the individual creditors of the deceased partner. But the decision in that case may have been controlled by a local statute giving the creditors of the copartnership the same rights against the separate property of the decedent as his individual creditors had.

The case of *Hoxie v. Carr*, (1 *Sum. Rep.* 104,) arose in the state of Rhode Island, and came before the late Mr. Justice

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Story, in the circuit court of the United States, upon a bill in equity. And his honor decided that real estate of the copartnership, purchased with partnership funds, was in equity to be deemed the property of the partnership, without reference to the legal title, whether vested in all or any of the members of the firm; and that it must be considered and treated as personal estate, as regarded the payment of the partnership debts, and the adjustment of partnership rights, upon the winding up of the concern. He also said, in that case, that *Goodwin v. Richardson*, in the state of Massachusetts, turned upon a mere point of local law, under a local statute, and did not dispose of the equities between the parties resulting from general principles. He held, therefore, that the equitable lien of one of the partners, upon the real estate, for the adjustment of the balance due to him from the firm, and for the payment of the copartnership debts, was entitled to a preference over the legal title which the defendant had acquired, from the other copartner, with notice of such equitable lien. And the decision in the case of *Sigourney v. Munn*, in the adjoining state of Connecticut, (7 Conn. Rep. 11,) is in accordance with the principles stated by Judge Story in the case last referred to.

The case of *Coles v. Coles*, (15 John. Rep. 159,) in the supreme court of this state, appears from the marginal note, to be in conflict with this principle; but upon examining the report itself, it will be seen that there was nothing in that case to show when the property was purchased, or that it was purchased with partnership funds. All that appeared was that the partnership business had been carried on there, and that the two individuals composing the firm sold the premises, and the defendant received the whole of the proceeds of the sale, after paying off the incumbrance upon the lot. The court very properly considered it as real estate, held by the two copartners as tenants in common, and not as a part of the partnership property; and allowed the plaintiff to recover the one half of the surplus proceeds of the sale, in an action for money had and received for the use of the intestate. In *Smith v. Jackson*, (2 Edw. Ch. Rep. 28,) where real estate had been purchased

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with the funds of a copartnership which had become insolvent, the late vice chancellor McCoun decreed the surplus proceeds of the property, on the foreclosure of a mortgage thereon, to be paid to the creditors of the firm; as a part of the copartnership property.

In the case of *Smith v. Wood*, (*Saxt. Rep.* 76,) the chancellor of New-Jersey decided that where property had been purchased with the copartnership funds, but had been treated by the members of the firm as real estate, for a long time after the dissolution of the copartnership, and each of them had sold his undivided half of the land separately, and where the rights of creditors of the firm were not concerned, that the proceeds of the sale must be considered as the proceeds of real estate, held by the copartners merely as tenants in common. But he intentionally declined to express any opinion upon the question as to how the real estate, in that case, might have been considered in equity, as between the partners themselves, during the existence of the copartnership; or afterwards, as between the partners and creditors. In the subsequent case of *Baldwin v. Johnson*, (*Idem*, 441,) that court recognized and acted upon the principle that real estate purchased with partnership funds is, in equity, the property of the partnership, although the legal title is taken in the name of one of the members of the firm only.

In *McDermot v. Lawrence*, (7 *Serg. & Rawle's Rep.* 438,) where land was leased in fee to the members of a copartnership, and buildings erected thereon by them out of the partnership funds, and where one of the lessees, some years after the dissolution of the partnership, and after the premises had ceased to be used for partnership purposes, mortgaged his third of the premises to a bona fide mortgagee, who had no notice of the equities claimed by the other partners, the supreme court of Pennsylvania decided that, as between the mortgagee and partnership creditors, the mortgaged premises were to be considered as real estate; and that the mortgagee was entitled to priority in payment out of the proceeds of the undivided third mortgaged to him. There is nothing in this decision inconsistent with the

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settled rule of equity in England on the subject of the real estate belonging to a copartnership. For it is admitted that a bona fide purchaser, or mortgagee, who obtains the legal title to the property without notice of the equitable claims of other members of the firm, is entitled to protection. But in a more recent case, the supreme court of Pennsylvania has gone much further. For in *Hale v. Henrie*, (2 *Watts' Rep.* 144,) that court decided that it was not competent to show by parol, to affect the title or possession, that land deeded to two persons as tenants in common, was purchased and paid for by them as partners, and was, in fact, partnership property; but that when partners intended to bring real estate into a partnership stock, their intention must be manifested by deed, or writing, placed on record.

In *Forde v. Herron*, (4 *Munf. Rep.* 316,) the court of appeals in Virginia recognized the principle that real estate, purchased with the funds of a copartnership, might in equity be liable to the equitable liens of the individual partners, in preference to the separate debts of those partners in whom the legal title was vested. But they held that a bona fide mortgagee was protected, under the circumstances of that case. That court again recognized the principle in *Deloney v. Hutcheson*, (2 *Rand. Rep.* 183.) But a majority of the judges thought there was nothing to show that the property in question was purchased with the funds of the firm, or as partnership property. There is nothing in either of those decisions, therefore, which is inconsistent with the decision in a previous case, of *Edgar v. Donnelly*, (2 *Munf. Rep.* 387.)

In the case of *Baird v. Baird*, (1 *Dev. & Bat. Eq. Ca.* 524,) the supreme court of North Carolina decided that lands purchased with partnership funds, belonged to the copartnership; and could not be partitioned, until the accounts of the copartners were taken, and the interest of each partner therein ascertained. And in the case of *Richardson v. Wyatt*, (2 *Dess. Eq. Rep.* 471,) the court of chancery in South Carolina decided that real property, thus purchased, belonged to the firm; and the widow of a copartner who had died, largely indebted to the

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h. n., was not entitled to dower in his legal estate in such property. And in *Winslow v. Chiffelle*, (*Harp. Eq. Rep.* 25,) the court of appeals in that state held that the real estate of the partnership was chargeable with the debts of the firm, in preference to the separate debts of individual members.

In *McAllister v. Montgomery*, (*3 Hay. Rep.* 94,) the court of errors and appeals, in Tennessee, decided that under the statute of that state, relative to joint tenancies for the purpose of trade and commerce, real property belonging to the copartnership went to the surviving partner, for the purpose of paying the debts of the firm; and that the heirs at law of the deceased partner were entitled to the residue of his share, after the partnership concerns were adjusted, and the debts of the firm paid. And in a recent case the present supreme court of that state decided that real estate, purchased by a partnership for the use, or on account of the firm, was in equity to be deemed partnership property; no matter in whose name the purchase was made, or whether the legal title was in one or all of the copartners. (*Hunt v. Benson*, *2 Humph. Rep.* 459.) It was also held in that case, that if the property was paid for with the funds of the firm, it was prima facie evidence, and decisive in the absence of countervailing circumstances, that it was intended to be held as partnership property.

In *Greene v. The Surviving Partners of Greene & Co.*, (*1 Ham. Ohio Rep.* 535,) the articles of copartnership provided that, upon the dissolution of the firm, the property of the concern should be sold, and the proceeds applied in the first place to the payment of the debts due from the partnership. And the supreme court of Ohio decided, in that case, that the real estate of the firm, although the legal title thereof was in all the copartners, as tenants in common, was subject to the equitable liens of the individual partners for the adjustment of the affairs of the firm. And one of the partners having died indebted to the firm, in an amount greater than the value of his share, it was held that his widow was not entitled to dower in the property. The case of *Greene v. Graham*, (*5 Idem*, 264,) is not in conflict with that decision. For it was only decided, in the

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latter case, that a person claiming under a sale made by the representative of the deceased partner, was prima facie entitled to partition; in the absence of all proof that the one half of the property did not in equity belong to the deceased partner.

In the case of the heirs of *Pugh v. Currie*, (5 *Alab. Rep. N. S.* 446,) one of the members of the firm purchased real estate with the copartnership funds, with the intention of improving and selling such lands for the use and benefit of the firm. He afterwards died insolvent, leaving the firm deeply indebted. Upon that state of facts the supreme court of Alabama decided that, in equity, the land belonged to the firm; and that the heirs at law of such deceased partner held the title in trust for the surviving partners, to pay the debts of the firm. So in *Woolridge v. Wilkin*, (3 *How. Miss. Rep.* 360,) the court of appeals of Mississippi held, that lands purchased with partnership funds, and which had been subsequently sold to pay partnership debts, were in equity a part of the joint stock of the firm, and that the widow of one of the partners, who did not join in the conveyance, and whose husband died subsequent to the sale, was not entitled to dower in the undivided share of the premises of which her husband once held the legal title, as a tenant in common with his copartners. And in the case of *Thayer v. Lane*, (*Walk. Ch. Rep.* 200,) Chancellor Manning, of Michigan, decided that, as between the partners themselves, real estate purchased with partnership funds was in equity partnership property, and that as between them it should be divided as such, upon the dissolution of the firm: unless, at the time of the purchase, it was understood to be an individual and not a partnership transaction.

Although a court of equity considers and treats real property as a part of the stock of the firm, it leaves the legal title undisturbed, except so far as is necessary to protect the equitable rights of the several members of the firm therein. And in the present case, Sumner was the owner of the one half of the mortgaged premises, subject to the equitable lien of his copartner thereon, for one half of the debts which the latter was obliged to pay, subsequent to the dissolution of the firm; the

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personal property of the copartnership having been disposed of at the time of such dissolution. That prior equitable lien, however, was paramount to the subsequent legal lien of the appellant, by virtue of his judgment. For the separate creditors of the individual partners have no equitable right, to any part of the partnership property, until the debts of the firm are provided for, and the rights of the partners as between themselves fully protected. (*Nicholl v. Mumford*, 4 *John. Ch. Rep.* 522. *Christian v. Ellis*, 1 *Gratt.* 396. *Cammack v. Johnson*, 1 *Green's Ch. Rep.* 163. *Pierce v. Tierman*, 10 *Gill & John.* 253.)

The lien which the appellant, in this case, had obtained, upon the legal title of his judgment debtor, in one half of the equity of redemption in the mortgaged premises, by the prior docketing of his judgment, must therefore yield to the superior as well as prior equitable claim of Naylor, upon the same equity of redemption as partnership property. For the general lien of a judgment creditor, upon the lands of his debtor, is subject to all equities which existed against such lands, in favor of third persons, at the time of the recovery of the judgment. And the court of chancery will so control the legal lien, of the judgment creditor, as to restrict it to the actual interest of the judgment debtor in the property; so as fully to protect the rights of those who have a prior equitable interest in such property, or in the proceeds thereof. (*White v. Carpenter*, 2 *Paige's Rep.* 217. *Kierstead v. Avery*, 4 *Idem*, 9. *Matter of Howe*, 1 *Idem*, 125.)

The respondent, therefore, is entitled to the whole surplus proceeds which are in litigation here. And the decretal order of the vice chancellor must be affirmed with costs.

In the matter of BURR, a lunatic.

Where the chancellor becomes satisfied that a person who has been found to be a lunatic, upon an inquisition issued out of the court for that purpose, has so far recovered his reason as to be capable of disposing of his estate, by will, with sense and judgment, he has the power to suspend the proceedings against such lunatic, partially, so as to enable him to make a will.

But the chancellor will direct such will to be made under the superintendence of some proper officer of the court, in order to guard such a testator against the immediate exercise of any undue or improper influence.

The court of chancery has the power to suspend the operation of a commission and an inquisition, in a case of lunacy, so far as to allow the individual, who had been found to be a lunatic, to make a testamentary disposition of his property; without discharging the proceedings entirely and restoring him to the full control of his property, for every purpose.

THIS was a petition, by Charles Burr, to supersede the commission of lunacy so far as to enable him to make a will disposing of his estate in case of his death. By the death of his father, in 1844, the petitioner became entitled to a very large estate; consisting mostly of personal property. At that time his mind had become so far impaired by irregular habits, and the neglect of those who should have watched over and protected him, that he was found to be of unsound mind, so as to be incapable of managing his person and estate. A committee of his estate was therefore appointed. And the chancellor had directed another person to be appointed the committee of his person, with a liberal allowance to the petitioner for his support and travelling expenses; and with directions to the committee of his person to employ a competent man as a travelling companion, and otherwise to assist in keeping him out of difficulty, and to endeavor if possible, to restore his mind to its former strength and vigor. Burr subsequently presented a petition, accompanied by the affidavits of several respectable men who had been in the habit of seeing and conversing with him for the last two years, stating that his mind was so far restored that he was now competent to make a judicious and valid disposition of his estate by last will and testament; and that he was desirous of disposing of his estate by will in a different manner from that in which it would be disposed of, by law, in

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case he should die without a will. He therefore prayed that he might be allowed to attend in open court, or before some master or other officer thereof, for the purpose of being examined as to the state of his mind and his competency to make a valid will; and that he might be authorized and allowed, under the personal protection and superintendence of the court, or some officer thereof, to make a will, and thereby to dispose of his estate, in such way and manner as he might desire, under and in conformity to the laws of the state; and that the commission and inquisition &c. might be so far suspended as to allow him to make such will.

THE CHANCELLOR. I have duly considered this petition, and have examined and conversed with the petitioner for the purpose of ascertaining the state of his mind. And I am satisfied his mind is so far restored as to enable him to dispose of his estate by will with sense and judgment; provided he is allowed to do so under the superintendence of some proper officer of the court, to guard him against the immediate exercise of any undue or improper influence. It also appears, from the petitioner's statements as to the situation of his family connections, that all his personal estate, in case of his death without a will, would go to the surviving brother and sister of his deceased mother, as his next of kin; one of whom is a man of great wealth. And there are a great number of first cousins of the petitioner, the children of deceased brothers and sisters of his mother; some of which cousins, as he states, have peculiar claims upon his bounty, on account of the kindness and care which their deceased parents bestowed upon him when he was in a situation to need it. But as the statute of distributions, in this state, does not allow of representation among collateral relatives of the decedent, beyond nephews and nieces, none of his cousins will be entitled to share in his personal estate, if he should die in the lifetime either of his uncle or of his aunt. Although such an event is very improbable, he should unquestionably be permitted to make a will, disposing of his estate

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according to his own wishes, if his mind is not now unsound so as to render him incompetent.

I think the general state of his mind has greatly improved since the finding of the inquisition, in this matter, more than two years since. And if a commission were to be issued against him, at this time, he would not, probably, be found to be a person of unsound mind. But as his mental powers are not yet fully restored to their original strength and vigor, it might not be a discreet exercise of the power of the court now to discharge his committee, and restore him to the entire control of his property, and thereby to leave him exposed to the arts and devices of those who might be disposed to take advantage of the weakness of his mind, to defraud him of his estate.

The only question in this case is as to the power of this court to suspend the operation of the commission, and of the inquisition, so far as to allow him to make a testamentary disposition of his property, without discharging the proceedings against him entirely, and restoring him to the full control of his estate for every purpose. But upon a careful examination of the question, I think the court has the power to discharge the proceedings against him partially; retaining the control of his property so far only as may be deemed necessary to protect the same for his benefit. This has frequently been done by the court in the case of habitual drunkards, who had been found incapable of governing themselves and managing their property, and who were actually endeavoring to abandon their former degrading habits; but who had not yet so far overcome the cravings of their diseased appetites as to render it safe to put their property wholly under their control. The case under consideration is similar in principle; although the petitioner's original incompetency did not arise entirely from his indulgence in the use of intoxicating liquors, but was produced, in a great measure, by other causes, which are now removed.

I shall therefore direct an order to be entered, to discharge the petitioner from the commission and inquisition, and from the control of the committees of his person and of his estate, so far as to permit him to make a will under the advice and

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with the sanction of the vice chancellor of the fourth circuit, disposing of his property, or any part of it, after his death, in such manner as he may think proper; which will he is to be at liberty to revoke and cancel entirely without such sanction. But he is not to revoke such will in part, nor make a new will, without the advice and sanction of such vice chancellor, or of one of the justices of the supreme court to be elected under the provisions of the present constitution of this state, until the control of his property shall be fully restored to him, or until the further order of the court.

Such an order will of course be without prejudice to the rights of the petitioner's heirs at law, or next of kin, to contest the validity of his will, if he should make one, and should die leaving it unrevoked. The sole object of the order being to remove the technical objection, that a person who has been found by inquisition to be incapable of governing himself and managing his affairs, is legally incompetent to make a valid will, while his person and property are under the control of the committee appointed by the court.

SPEAR, executor, &c. vs. TINKHAM and others.

Where an executor mixes up the trust funds with his own, or neglects to keep regular accounts of the investments, and of the interest received upon such funds from time to time, he is chargeable with interest as if the fund had been kept invested upon interest, payable periodically, and as if the payments had been made by him from the interest and principal thus received, and in hand, when the payments from the trust fund were made by him. And interest should not be computed upon the capital fund for a term of years, with a deduction of the payments, and interest on such payments in the meantime.

As a general rule, where there is a bequest of the whole of the testator's personal estate, or of the residue thereof after payment of debts and legacies, to one person for life, with a remainder to others after the termination of such life estate therein, the whole must be converted into money and invested in permanent securities by the executor, and the income paid over to the person entitled to the life estate.

The rule is the same where a residuary bequest for life, or for a limited term, em-

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braces articles not necessarily consumed in the using—such as furniture, books, plate, &c. and also property which must be so consumed; unless the will indicates an intention, on the part of the testator, that the legatee for life shall enjoy the property, or some particular part thereof, in its then state, as a specific bequest. Whenever specific articles, not necessarily consumed in using, are bequeathed to a legatee for life, with a limitation over, and without any direction to the executor to hold them in trust for the remainder-man, the executor is authorized to deliver the same to the person entitled to a life estate therein; taking from such person an inventory and receipt, specifying that such articles only belong to the first taker for life, and that afterwards they are to be delivered to the legatee who is entitled to them in remainder.

THIS was an appeal from the sentence and decree of the surrogate of Ontario county, upon the final settlement of the account of the appellant, as the executor of J. Tinkham, deceased. The testator died in 1822, leaving his wife and three children surviving him. By his will he bequeathed to his widow the use and occupation of his personal property; and directed that the Baptist Church in Palmyra should have the guardianship and control of such use, for her benefit. And after the decease of the widow, he gave the property to his son and two daughters. The estate of the testator, after payment of his debts and the expenses of administration, amounted to about \$600. By the direction of the church the executor delivered to the widow, shortly after the death of the testator, about \$100, of the property mentioned in the inventory, and \$10,76 in money. The residue, the executor converted into money, and for a time kept it separate from his own funds, but finally mixed and loaned it out with his own moneys, indiscriminately. The widow died in May, 1841, and between the death of the testator and that time, the executor paid out of the estate to the widow, or for her support, about \$800. The surrogate allowed to the executor full commissions upon the amount of the inventory; and also five per cent upon all the payments made to the widow, as an extra compensation for his services. He also allowed him for all the payments made to the widow, or for her support; although they considerably exceeded the whole interest upon the value of the property, in the hands of the executor, in which she had a life estate. And he stated the account by charging the executor from time to time with interest upon the

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balances in his hands, after one year from the death of the testator, and crediting him with the payments, so as to apply such payments first to the satisfaction of the interest then accrued, and the residue towards the reduction of the capital of the estate in his hands. In this mode of stating the account, a balance was found in the hands of the executor, in Feb. 1845, of \$194,14. Out of this sum the executor was allowed, for costs and expenses, and for surrogate's fees, &c. \$45,67. And the balance he was decreed to pay to the three children of the testator equally, with interest after the 20th of March, 1845. But the executor was allowed to retain out of the amount payable to each of the legatees, a commission of five per cent. The executor appealed from the whole decree; and the respondents having neglected to appear and answer the petition of appeal, the case was heard *ex parte* as against them.

T. R. Strong, for the appellant.

THE CHANCELLOR. The surrogate adopted the legal mode in computing the interest, in this case, if any interest account was proper in settling the account between the executors and those who were entitled to the personal property after the death of the widow. Where an executor mixes up the trust funds with his own, or neglects to keep regular accounts of the investments and interest received upon such funds from time to time, there is no other way in which justice can be done to the cestuis que trust, than to charge him with interest as if the fund had been kept invested upon interest, payable periodically, and as if the payments had been made, by him, from the interest and principal thus received and in hand when the several payments from the trust fund were made by him. And interest should not be computed upon the capital fund, for a term of years, with a deduction of the payments, and interest on such payments, as claimed in the schedules presented to the surrogate in this case. Considering the will, therefore, as giving to the children of the testator only so much of the personal estate as might not be wanted for the use and support of the widow the

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decree of the surrogate is less favorable to the respondents than it should have been. For the surrogate has, in effect, allowed the executor ten per cent commissions upon all the capital of the estate of the decedent which was not delivered over to the widow in the first place; and five per cent upon the part thus delivered to her, and upon the interest subsequently received. And there are some other errors in favor of the respondents.

The surrogate was wrong, however, in the construction of the will, if he has correctly stated its contents in his return. And instead of allowing to the executor any payments made to or on account of the widow, out of the capital of the estate, he should have charged him with the whole capital in his hands, exclusive of the specific articles of personal property, which would not be consumed in the using, delivered to her soon after the death of the testator. There is nothing in the will, as set out, from which it can be inferred that the testator intended to give to his widow any part of the capital of his personal estate. He gave to her merely the *use* and *occupation* thereof for life; expressly bequeathing it to his three children after her death. The placing of the guardianship and control of such use in the trustees of the church, if it was not absolutely void as a trust, could not enlarge her life estate in the property. It was, at most, constituting the church, in its corporate capacity, a trustee of her interest in the testator's estate.

As a general rule, where there is a bequest of the whole of the testator's personal estate, or of the residue thereof after payment of debts and legacies, to one person for life, with a remainder over to others after the termination of such life estate therein, the whole must be converted into money, and invested in permanent securities, by the executor, and the income paid over to the person entitled to the life estate. (*How v. Earl of Portsmouth*, 7 Ves. 137. *Fearns v. Young*, 9 *Idem*, 549. *Shuler v. Covenhoven*, 2 *Paige's Rep.* 122.) The rule is the same where the residuary bequest for life, or for a limited term, embraces articles not necessarily consumed in the using; such as furniture, books, plate, &c., as well as property which must be consumed; unless the will contains indications of an inte

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tion, on the part of the testator, that the legatee for life should enjoy the property, or some particular parts thereof, in its then state, as a specific bequest for life. (*Mills v. Mills*, 7 *Sim. Rep.* 501. *Randall v. Randall*, 3 *Mer. Rep.* 193. *Collins v. Collins*, 2 *Myl. & Keen*, 703. *Alcock v. Sloper*, *Idem*, 699. *Bethune v. Kinerly*, 1 *Myl. & Craig*, 114. *Pickering v. Pickering*, 4 *Idem*, 28.) Wherever specific articles, not necessarily consumed in using, are bequeathed to a legatee for life, with a limitation over, and without any direction to the executor to hold them in trust for the remainder-man, the executor is authorized to deliver the same to the person entitled to a life estate therein; taking from such person an inventory and receipt stating that such articles only belong to the first taker, for life, and that afterwards they are to be delivered to the legatee who is entitled to them in remainder. (*Leake v. Bennet*, 1 *West's Ch. Rep.* 284. *Bill v. Kinaston*, 2 *Atk.* 82. *Foley v. Burnell*, 1 *Bro. C. C.* 279.)

The precise language of the will is not given in the surrogate's return, in this case, nor does the return state what was the nature of the property that was delivered to the widow soon after the testator's death. Perhaps, therefore, the executor may have been authorized to deliver to her that part of the property, except the \$10,76 in money, to be kept by her for life, and to be received from her by the children at her death. But even if the executor was not answerable to the children for that part of the capital of the personal property, he was bound to keep the capital of the residue of the estate properly invested, for the use of the testator's son and daughters after the death of the widow. And the interest or income alone of that part of the estate should have been paid to the widow, or paid out for her support, according to the true construction of the will, so far as an opinion of its terms can be formed from the return of the surrogate. If the respondents had appealed from the sentence and decree of the surrogate, therefore, I should, upon this return, have been bound to charge the executor, for the capital of the fund belonging to them, and interest thereon after the death of the widow, with an amount three or four times as large as the

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executor has been charged therefor, by the surrogate. The present appellant then has no ground to complain of the decree.

The sentence and decree appealed from is therefore affirmed; and the proceedings are to be remitted to the surrogate.

BENNETT vs. BYRNE and others.

[Concurred in, 5 Redf. 262.]

Upon the appointment of a general guardian for an infant, by a surrogate, the surrogate should ascertain, by the examination of witnesses, the probable amount of the personal estate, and of the income of the realty during the minority of the infant. And he should direct the guardian to give a bond, with sureties, in double that amount; and should require the sureties to justify in at least the amount of the penalty of such bond.

In making an appointment of a guardian for an infant, the true interest of the infant is to be consulted, rather than the interests, or the wishes, of those who are desirous of the guardianship.

The fact that the mother of an infant, upon her death-bed, expressed the wish that a particular relative should adopt such infant and bring it up as his own, and should see that its property was not wasted, should have a preponderating influence with the surrogate, other things being equal, in favor of the appointment of such person as guardian of the infant.

The probability, if a particular person should be appointed guardian of an infant, that the estate will be subjected to the expense of a new appointment, within a very short time, and to the other expenses incident to a change of guardianship, is a circumstance entitled to some weight in favor of the appointment of another person, by the surrogate.

Where a person, applying to be appointed guardian of an infant, is already the trustee of such infant, for the purpose of expending the income of an estate for his support and education, it is a circumstance in favor of his appointment as such guardian; in order that the infant may not be subjected to the expense of separate accounts of the expenditures for his support; the one on the part of the trustee, and the other by the guardian.

THIS was an appeal, from an order of the surrogate of the county of Greene, appointing Polly Byrne guardian of the person and estate of James Byrne, an infant. The facts in the case, as they appeared in the return of the surrogate, were as follows: James Byrne, the father of the infant, married the

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daughter of John Bennett, the appellant, in 1842, and died at the house of his father-in-law, in March, 1845, leaving his wife surviving him. By his will he bequeathed the income of \$1500 to his mother for life, and directed the principal of that legacy to be equally divided between his two sisters, after his mother's death. And the residue of his personal estate he bequeathed to his wife, and to his heir, born after his death ; with a limitation over to his mother and sisters in case his wife should die without leaving any heirs by him. Four days after the death of James Byrne, the infant was born. And its mother, Abigail Byrne, was sick from that time until her death ; which occurred in June of the same year. She had made her home at her father's, from the time of her marriage until her death ; her husband, while living, being engaged in sailing one of the North river steamboats, and being much of his time absent. Shortly before her death she gave her infant child to her father, and requested him to take care of it as his own. She also enjoined upon him to have it religiously instructed and sent to the sabbath school, and to be careful to preserve its property so that it should not be squandered. By her will, which was made about a fortnight before her death, she bequeathed to her father, as her executor and trustee, all her interest in the estate of her deceased husband, as his residuary legatee, in trust for the sole benefit of her infant son. And she directed her executor and trustee to invest the same in such manner as he should deem safe and most productive, and to apply so much of the income thereof as he might deem necessary to the support and education of the infant. In case the infant should die under twenty-one, she gave one-fourth of her property to her cousin M. B., who at the time of the making of the will was performing the duties of a mother to the infant, and the other three-fourths thereof she gave to the appellant.

The nearest relatives of the infant, after the death of his mother, were his paternal grandmother, Polly Byrne, a widow lady between seventy and eighty years of age, and her two maiden daughters, who lived with their mother, and who during the life of the infant's father had derived their principal support

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from him ; George Byrne, a paternal uncle, who was married and had four small children ; John Bennett, the maternal grandfather of the infant, then between fifty-five and sixty years of age ; and H. Bennett, the maternal uncle, a bachelor of twenty-five, who resided with his father. The wife of J. Bennett was about fifty-five, and had no children. She was the sister of the infant's maternal grandmother, and had lived in the same family with the mother of the infant for about twenty years, but was not in good health.

About a month after the death of the infant's mother, G. Byrne, the paternal uncle, applied to the surrogate to be appointed guardian of the infant ; and notice of the application was directed to be given to the maternal grandfather. The latter appeared and opposed that application ; which was finally abandoned. The appellant thereupon asked for the appointment for himself ; and the surrogate directed notice to be given to the paternal uncle and grandmother. They both appeared before the surrogate and claimed the appointment. And after hearing of the parties and their proofs, the surrogate denied the application of the appellant, and appointed Polly Byrne, the maternal grandmother, the guardian, upon her executing a bond with sureties in the penalty of \$7,000. The surrogate afterwards approved of a bond executed by the guardian and her sureties, without requiring the sureties to justify ; although the counsel for the appellant requested to be heard before him in relation to the sufficiency of the bond. And the petition of appeal stated that the sureties were wholly insufficient, and that one of them was not worth the sum of \$500, over and above his debts.

M. T. Reynolds & J. Van Vleck, for the appellant.

H. Hogeboom, for respondents, Polly and George Byrne.

THE CHANCELLOR. It was improper to approve of the bond, of the sureties, without requiring them to justify. The return of the surrogate that he knew the sureties to be responsible, amounts to nothing. For I cannot infer, from that, that he

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means to return under his oath of office that he knew they were worth \$7000 over and above all debts and responsibilities. The proper course for the surrogate, upon the appointment of a guardian, is to ascertain, by the examination of witnesses, the probable amount of the personal estate, and of the income of the realty during the minority of the infant. And when he has done that, he should direct the guardian to give a bond, with sureties, in double that amount; and should require the sureties to justify in at least the amount of the penalty of such bond. In this case there does not appear, by the return, to have been any evidence as to the value of the personal estate, or of the income of the real estate, which came to the infant from his father. The half of the residuary estate of the father, which was bequeathed to the infant by his mother, being by her will placed in the hands of her executor and trustee, could not come to the possession of the guardian, and therefore need not have been included in the bond. But the value of the other personal estate of the infant, with the interest thereof during his minority, and the probable value of the income of his real estate, during the same period, should have been ascertained by the examination of those who were acquainted with the situation and value of the property. And the penalty of the bond, and the justification of the sureties in such bond, should have been regulated accordingly.

The surrogate also erred, in this case, in refusing to appoint the appellant the guardian of the infant, and in committing the guardianship to the grandmother. There are several considerations which should have induced the appointment of the maternal grandfather. In making such an appointment, the true interest of the minor should be consulted, rather than the interests or the wishes of those who are contending for the guardianship. Here the appellant was already the trustee of the infant, to expend the income of the mother's estate in his support and education. And the appointment of any other person as guardian might subject the infant to the expense of separate accounts of the expenditures for his support; the one on the part of the executor and trustee of the mother, who was

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charged with the support and education of the infant out of the income of the property bequeathed by her, and the other by the guardian of the estate which came to the infant directly from his father. It would also be likely to lead to collisions between the executor and the guardian, as to what expenditures were necessary and proper for the infant, and as to the manner in which he should be brought up and educated. For each would have a discretion to exercise, upon the subject of necessary expenditures for those purposes.

Again ; the strongly expressed wish of the mother, upon her death-bed, that the appellant should adopt her orphan child, then about twelve weeks old, and bring it up as his own, and should see that its property was not wasted, was a circumstance which ought to have had a preponderating influence in favor of the appointment of the appellant ; other things being equal. The fact that Mrs. Byrne was far advanced in years, was not of itself conclusive against her. For it appeared that she had two maiden daughters, living with her, who could see that the infant was properly cared for. But the probability that if she was appointed the infant's estate would be subjected to the expense of a new appointment within a very few years, and to other incidental expenses necessarily attending a change of guardianship, was a circumstance which was entitled to some weight in favor of the appellant. The fact that George Byrne had four young children who would require the whole attention of his wife, rendered it pretty certain that the infant would be better provided for in the family of the grandmother, or of the maternal grandfather, than in the family of that uncle. Although the present wife of the appellant was not the grandmother of the child, she was not a stranger to it in blood. And the fact that she had resided in the family of her present husband during her sister's life, and that the mother of the infant had been brought up under her care, rendered it highly probable that she would feel a strong affection for the orphan child of her deceased niece ; especially as she had no children of her own to draw off her affections from it. I have no doubt, therefore, that the child would be as well attended to in the family

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of the appellant as it would be in that of its maternal grandmother, in her straitened circumstances, if not better.

The surrogate therefore should have granted the application of the appellant, and thus left the child where it had been placed by the request of its dying mother. The orders appealed from must be reversed; and the proceedings must be remitted to the surrogate, with directions to him to appoint the appellant the guardian, of the person and estate of the infant, upon his giving a bond in the usual form, in a penalty of at least double the value of the personal estate of the infant, other than that which came from the mother, including interest thereon during the infant's minority, and the probable income of the real estate during the same period; with two sufficient sureties who can justify in the amount of the penalty of the bond.

The costs of the guardian ad litem of the infant, and the costs of the appellant, upon this appeal and in the proceedings before the surrogate, are to be paid out of the personal estate of the infant which shall come into the appellant's hands as guardian.

And, it being suggested that one of the parties to this appeal has died, since the argument here, the decree to be entered upon this decision is to be entered *nunc pro tunc*, as of the time when the appeal was heard.

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An agreement made by a rail-road company, with a person owning land adjacent to the rail-road, to establish and maintain a permanent turnout track, and stopping place, at a particular point, in the neighborhood of his property, and to stop there with the freight trains and passenger cars of the company, is, in substance, the grant of an easement, or servitude, which is to be binding upon the property of the rail-road company, as the servient tenement, for the benefit of the owner of such adjacent property, and of all those who shall succeed him, in his estate, as owners thereof. And such an agreement, to be valid, must be in writing.

The negative easement, which the owner of the dominant tenement is to acquire by

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such an agreement, is an incorporeal hereditament; the right or title to which can only pass by grant, or deed under seal, or be acquired by prescription.

The provision of the revised statutes, declaring that no estate or interest in lands, or any trust or power over them, shall be created or granted, except by operation of law, or by a deed or conveyance in writing, &c. is sufficiently broad to prevent the acquiring of an easement in land by a verbal agreement merely.

A parol executory agreement, between an individual and a rail-road company, that the latter shall continue to stop with their cars at a particular place, adjacent to his property, as a permanent arrangement, is void by the statute of frauds; because from the nature and terms of the agreement it is not to be performed within one year from the making thereof.

THIS was an appeal from a decree of the assistant vice chancellor of the first circuit, dismissing the complainant's bill with costs. The object of the bill was to compel the Long Island Rail-Road Company to keep up and maintain a turnout track, and permanent stopping place for its freight trains and its passenger cars, on the line of its rail-road, at a place called the trotting course lane; for the benefit of the complainant as the owner of real estate adjacent to that place.

J. H. Raymond, for appellant. The evidence in this cause clearly establishes the contract, set forth in the complainant's bill, and a full and perfect performance of it on the part of the complainant. There is no uncertainty about the terms of the contract. They are explicitly stated in the bill, and fully made out by the evidence. Assuming that the terms of the contract as to the time and manner of performing it, and the portion of the labor and expense to be borne by the parties respectively, are made out with sufficient certainty, the next question that arises is as to the length of time during which this improvement was to continue. It is contended by the complainant that it was to be permanent, unless both parties should agree to discontinue it. The defendants secured to themselves the benefit of the drawback, or return of duties upon the iron laid on this turnout, as authorized by the act of congress, passed July 14, 1832. And to do this, they must have proved to the secretary of the treasury, by the oaths of their officers, that the rails were actually and permanently laid upon the turnout. For

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this proof is required to be made, by the 1st section of the act of congress, as a condition of such return of duties. The defendants are therefore estopped, by their own acts, from insisting that it was not the understanding that the arrangement was to be permanent. The complainant incurred a large amount of expense, and performed a large amount of labor, in fulfilling his part of the agreement. From the nature of the transaction it must be presumed that the complainant expected a permanent benefit from his expenditure of time and money.

There was a sufficient consideration for the obligation on the part of the defendants to keep this up as a permanent depot and stopping place. It is enough that the parties entered into the arrangement, and that the complainant has by the procurement of the defendants, incurred the expense and performed the labor necessary for grading the track for this turnout and stopping place. The complainant did not guaranty any particular advantage or profit to the defendants under this agreement. Of the sufficiency of the inducement for entering into the arrangement each party must determine; and having entered into the agreement, each party is concluded. Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor, detriment or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied, of the defendant. (*Sel. Nisi Prius*, 36. *Miller v. Drake*, 1 *Caines' Rep.* 45. *Powel v. Brown*, 3 *John. Rep.* 100. *Williamson v. Clements*, 1 *Taunt.* 523. *Religious Society in Whitestown v. Stone*, 7 *John. Rep.* 112.)

It was not essential to the validity of this agreement that it should have been authenticated by the corporate seal of the defendants, or confirmed by a formal resolution of the board of directors. It is enough that the agents and officers acted within the scope of their general power. A corporation, as well as an individual, may be bound by parol and implied contracts. An agreement made by the agents of a corporation exercising a general discretion and authority within the range of express

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or implied powers, is binding upon the company. More especially will it be valid if made and carried into execution under the eye and with the full knowledge of the officers and directors of the corporation, and when transactions material to the execution of the agreement, and connected with the execution of it, are acted upon and sanctioned as corporate acts. (*Mott v. Hicks*, 1 *Cowen*, 513. *Bank of Columbus v. Pater-son*, 7 *Cranch*, 299. *Fleckner v. The United States Bank*, 8 *Wheat*. 338. 2 *Kent's Com.* 288.) It is in proof that the directors and vice president of the company were cognizant of the fact that the excavation of the turnout and side track was going on, pursuant to an arrangement between the complainant and the defendants. The defendants' engineer, and his assistants, superintended the grading of the track, and took the levels and overlooked the laying of the rails. All the orders respecting this work, emanated in the usual way from the defendants; and the engineer, &c. were paid by them for their service. Every thing in fact material to establish this, as the rightful and authorized act of the defendants, is admitted in the answer. The fact also that the defendants made the necessary proof to the secretary of the treasury, that the rails on the track had been permanently laid, furnishes the most ample evidence, not only that this whole transaction was originally sanctioned by the defendants, but that they have affirmed and sanctioned it by their corporate and official acts.

This is not such a contract as comes within the statute of frauds. No interest in lands was created, granted or affected by it. Nor was any trust or power over or concerning lands, or relating thereto, created or affected by this agreement. Nor does any such object appear to have been contemplated by either of the parties to it. The defendants themselves have only a qualified interest in the land over which the road extends. They take it as a body corporate, in a limited capacity, and for a specific purpose. And when the object for which they have acquired it ceases, it will by operation of law revert to the original proprietors. (*Peck v. Smith*, 1 *Conn. Rep.* 103. *Hart v. Chalker*, 5 *Id.* 311. *Hooker v. Utica Turnp. Co.*, 12 *Wend.*

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371 2 *John. Dig. tit. Highways.*) The defendants cannot exercise powers, or acquire rights, for purposes foreign to their corporate existence. They cannot purchase or convey real estate in general terms or for general purposes. They may acquire certain rights in real estate, as connected with and incidental to the purposes of their incorporation; but these rights they are incompetent to sell, transfer or traffic in general terms. They are not the subject of the class of contracts contemplated by the statute of frauds. The business of the defendants has no relation to lands, in a legal or primary sense. They have a right, it is true, to use in a certain way, and upon certain terms and conditions, so much land as is necessary to construct their road and its appendages. And here their power over land, and their capacity to use or affect land, ceases. There is no right or title, then, in the defendants in relation to which the agreement in controversy could legitimately become a subject that would be affected by the statute of frauds. The contract in this case is simply one that relates to the construction of a part of the defendants' road, or an appendage to it; and regulates to a certain extent the manner of using it. It is no more a contract affecting lands, in the view of the statute of frauds, than the ordinary agreements with contractors or workmen to furnish or perform work in the construction of the road, or the ordinary agreements for the transportation of goods in a specified manner and for a given period of time. As to so much of the agreement as relates to the grading of the turnout by the complainant, and the laying down the rails by the defendants, it has reference merely to the construction of this portion of the defendants' road. And as to the stoppage of the cars, and other matters mentioned in said agreement, it merely has reference to the mode in which the defendants will carry on a certain portion of their business intended to be incidentally beneficial to the complainant when carried on in that manner. There is no imaginable right or privilege appertaining to the soil, or partaking of the nature of real estate, that the contract in question could secure to the complainant, were it enforced to its fullest extent. In the case of *Mumford v. Whitney*, (15 *Wend.* 380,)

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the court say that a license to enter upon lands is valid, though not in writing. This contract does not affect land so far as to give a license to enter upon it. It is a mere personal contract, whereby the defendants have bound themselves to do certain acts in relation to the business for which they were incorporated; upon an adequate consideration which they have received from the complainant. From such a contract the statute of frauds will not release them. (3 *John.* 216. 5 *Id.* 272. 11 *Id.* 145. 10 *Id.* 109. *Noyes v. Chapin*, 6 *Wend.* 461.)

But if upon general principles this were such a contract as might be affected by the statute of frauds, the fulfilment of it on the part of the complainant, and the laying down the track, and the establishment of the turnout by the defendants, are so far a part performance as to take it out of the operation of the statute. A part performance of an agreement, that might otherwise be void, will in equity prevent the statute from operating when there would be injustice in allowing a party to refuse to comply with an agreement which had been performed in part, or in the whole, on the other side, or when it would be a fraud upon the other party were performance refused. The statute has in terms exempted this class of cases from its operation. (2 *R. S.* 135, § 10.)

This is a proper case for the court to decree a compensation in damages, if it should be thought more conducive to justice and equity to give relief in this form. The court has jurisdiction to grant equitable relief. The case falls within that class of cases cognizable in courts of equity. It may decree a specific performance; and is bound to give relief in some form. Having jurisdiction, and the case being one suitable for equitable relief, the court may, instead of a decree for specific performance, decree a compensation in damages. The cases in which specific performance may be decreed are proper cases for a decree of compensation in damages, if in the judgment of the court justice would be better promoted by affording relief in that form. (*Denton v. Stuart*, 1 *Cox's Cas.* 288. *Phelps v. Thompson*, 1 *John. Ch. Rep.* 150. *Story's Eq.* 107, 8.)

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W. C. Noyes, for respondents. The complainant has failed to prove the contract alleged in his bill. The burthen of proof lies on him; and having attempted to show that the contract was made with Blydenburgh, he should have shown clearly that Blydenburgh possessed the power to make such a contract. This he has not done. There is no proof in the case, to show what were the powers of Blydenburgh as vice president, either general or special, which would warrant him in making such a contract. A contract like the one set out in the bill would not be within the usual scope of the powers or authority of any of the officers of the company. The power to make such a contract could only exist in the board of directors, or emanate thence by express delegation to some officer of the company. The general authority of the officers must have been confined to two particulars: the construction of the road, and the operating it when constructed. The utmost extent to which any officer could take an implied authority, for either of the above purposes, would be to procure labor in the construction of the rail-road, or in operating it, and to pay for, or pledge the credit of the company for its payment, in money. (*Angell & Ames on Corp.* 239, ed. of 1843. *National Bank v. Norton* 1 *Hill's Rep.* 572.) No vote, resolution, or proceeding of the directors, authorized the contract. No general by-law or regulation of the company is stated or set forth as sanctioning it. No proof shows how the company came to have a vice president, nor what were his powers and duties. And as a vice president is not spoken of in the charter, and the only power to appoint one comes from the revised statutes respecting corporations, he must clearly be one of those subordinate officers or agents which every corporation has the right to appoint, and the scope of his authority must necessarily be confined to subordinate matters, and not as extensive as that of the principal officers of the company. But even if Blydenburgh had the power to contract, it is manifest that he did not contract in such a manner as to bind the company. It cannot be successfully contended that the contract in question could subsist in parol. For it would be a contract creating an estate or interest in, or a trust or power

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over, or concerning lands, or in some measure relating thereto. (2 R. S. 69, § 6.) By the alleged contract, the company were bound to construct a rail-road, or side track, on their lands, adjacent to complainant's lands; to continue it there; to keep it in repair; and to use it in a particular manner. And the complainant had a power to insist on all these things being done. It would in fact amount to a right in the complainant to have a road or passage over lands of the defendants, of a peculiar construction, and to have it kept open and in repair, by them, during the continuance of defendants' charter. (*Cook v. Stearns*, 11 Mass. Rep. 533. *Jackson v. Buel*, 9 John. 298. 2 Black Com. 20, 35. *Mumford v. Whitney*, 15 Wend. 381.) The authorities above cited show that such a right would be an incorporeal hereditament; and could only be created by grant. The alleged contract, by its terms, was not to be, and could not be, performed within a year. (*McLees v. Hall*, 10 Wend. 438. 1 Barn. & Ald. 722. *Hinckley v. Southgate*, 11 Verm. Rep. 340.) Again; such a contract as the one set up in the bill could only be made under the seal of the company, And in that case alone would it be binding on the corporation. (*Arnold v. Mayor, &c. of Poole*, 7 Lond. Jurist, 653.)

But if it be conceded that there was some kind of a contract, it is plain that according to the rules of equity, it ought to be positive and clear in its terms, in order to justify a decree for a specific performance. The terms in which the statement of the contract is made, in the bill, are loose and indefinite. No time is mentioned during which it was to continue; nor does it appear, with clearness, what the defendants were bound to do. (See *Kendall v. Alair*, 2 Sumner's Rep. 278; *Thomson v. Scott*, 1 McCord's Ch. Rep. 32; *Parkhurst v. Van Cortlandt*, 1 John. Ch. Rep. 283; *Phillips v. Thompson*, Id. 131; 1 Sugden on Vend. 120 to 132.)

The contract, if made, was not made upon adequate consideration. All that the complainant did, was to perform the excavation and grading; amounting to about 3000 cubic yards of excavation. This, at 14 cents per yard, would come to \$420; but in making this excavation, he was aided by the

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labor of a man and a horse, and the use of the cars of the company, with other privileges. For this he would claim that the defendants should place there their timbers and iron rails, worth from \$7000 to \$10,000 per mile, or, for the 1700 feet which this turnout extended to, at least \$3000; and supply the materials when decayed, and incur the whole expense of repairs and superintendence. The contract would be so strikingly inequitable as to come within that class of cases where a specific performance has been refused upon that ground. Besides; it may well be that the complainant, from the time that the track continued, that is, from 1837 to 1841, derived sufficient benefit to compensate him for his expenditures. The contract, if made, was therefore voluntary, or nearly so. (*Black v. Card*, 2 *Harris & Gill*, 100. *Graves v. Graves*, 3 *Young & Jervis*, 163.) The cases cited on the other side are all cases at law; and are not authorities to determine in what cases courts of equity will decree specific performance.

The contract calls for continued acts to be done by defendants from the time it was made, during the continuance of defendants' charter. It is not practicable for a court of chancery to execute such a contract; because it has no means to compel such execution. The court would have to appoint a special master in chancery, or other officer, to see that the side track was kept in repair and properly attended, and that every passenger train stopped to take in and unload passengers, and that every thing continued to be done for the performance of the contract. (*Capes v. Hutton*, 2 *Russ.* 357. *Rivafinoli v. Corsetti*, 4 *Paige*, 264. *Clark v. Price*, 2 *Wils. Ch. Rep.* 157. *Agar v. McLew*, 2 *Sim. & Stew.* 418.) The general principle of these cases is, that the court will not direct a performance, unless it has the power to direct and superintend all the acts necessary for a performance.

The case shows that no contract was in the contemplation of either party, looking further than to effect the temporary object, then in view, to lay down the iron rails at the place in question. And if a change of circumstances has rendered it inexpedient for the company to continue the turnout, they

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ought to be allowed to discontinue it ; especially as its continuance would not benefit the complainant.

The complainant is not entitled to a compensation in damages, at least not in this court, because there was no contract with him ; and if no contract, then no damages. Besides ; we derived no benefit from any of his acts. The road bed was already graded on the north side, where all our other side tracks were laid, so as to form parts of a second track ; and without incurring a dollar of expense for excavation, we could have laid our rails there. Our laying them on the other side, to accommodate the complainant, cannot afford a foundation for any claim to damages. It does not appear that the complainant has sustained any damage by our moving the rails. They had lain there five years, and during the last two at least, had been wholly useless ; and the presumption is that they would have continued so.

THE CHANCELLOR. The complainant claims the relief asked for in his bill, under an alleged agreement, by parol, made with him by one of the officers of the rail-road company, to establish and maintain a permanent turnout track and stopping place in the neighborhood of his property ; and to stop there with the freight trains and passenger cars of the company. And the consideration for the alleged contract, was the labor which he was to perform in excavating and grading the land at that point upon the rail-road. I think, with the vice chancellor, that the complainant failed to establish an agreement which was binding upon the company, even if it was competent for him to establish an agreement of this kind by parol. There is no sufficient evidence of the authority of Blydenburgh to make such an agreement for the company. Neither does his testimony show that the stopping place was to be continued there during the existence of the charter of the company, or for any definite time ; though Blydenburgh and the complainant undoubtedly supposed it would be continued there, unless the interest of the company and the convenience of the public should require its removal to some other place.

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Again; I think the agreement, which the complainant claims to have been made, could not be made by parol, under the provisions of the common law and of the statute of frauds. It was, in substance, the grant of an easement or servitude, which was to be binding upon the property of the rail-road company, as the servient tenement, for the benefit of the complainant, and those who should succeed him in his estate, as the owner of the adjacent property. (1 *Pardessus Traite des Servitudes*, ch. 1.) For the complainant has no legal interest in having a turnout track and stopping place permanently established there, except as it may benefit him as such owner. The right claimed by him therefore, under the parol agreement with Blydenburgh, is a negative easement in the property of the rail-road company. That is; the power to restrict the company, as the owners of the servient tenement, in the exercise of general and natural rights of property; and to compel them to use it in a particular way, by keeping certain erections thereon and stopping with their trains at a particular place, for his use and benefit as the owner of the adjacent land, as the dominant tenement. It is therefore an incorporeal hereditament; the right or title to which can only pass by grant, or deed under seal, or be acquired by prescription. In the case of *Fentiman v. Smith*, (4 *East's Rep.* 107,) Lord Ellenborough states the principle, distinctly, that the right to have water pass over the lands of another, by a tunnel, could not be acquired by a parol license, without deed. In the case of *Hewlins v Shippam*, (7 *Dow. & Ryl.* 783; 5 *Barn. & Cress.* 221, *S. C.*) the defendant, for a valuable consideration, had assented to the making of a drain, in his lands, by the defendant, and the latter had made it at considerable expense. The defendant was sued for stopping up the drain. And the court, upon a full examination of all the cases, decided that an easement in the land of another was an uncertain interest in land, within the statute of frauds, and could not be acquired by a parol agreement.

The provision of the revised statutes on this subject is, that no estate or *interest* in lands, or any trust or power over or concerning lands, or in any manner relating thereto, shall be cre

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ated, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance, &c. (2 R. S. 135, § 6.) And it is sufficiently broad to exclude the idea of acquiring an easement in land by a verbal agreement merely

And as a mere executory agreement between the complainant and the company, that the latter should continue to stop with their cars at that place, as a permanent arrangement, the agreement made by Blydenburgh for the company was void; because, from the nature and terms of the agreement it was not to be performed by the company within one year from the making thereof. (*See* 2 R. S. 135, § 2, *sub.* 1.)

The complainant, therefore, was not entitled to the relief prayed for in his bill, nor to any other relief, upon the pleadings and proofs in this case. His bill was properly dismissed; and the decree appealed from must be affirmed with costs.

MERIAM *vs.* HARSEN and others.

The technical common law rule, that a feme covert cannot make a conveyance to her husband, does not apply to a conveyance made by the wife to her husband, through the medium of a third person.

In that manner a feme covert may exercise the same control over her real estate, for the benefit of her husband, as she could if it was held by a trustee, with a power in her to appoint it to whom she pleased. All that the court of chancery will do in such cases, is to see that the wife has not been imposed upon, by her husband, by his taking an unconscientious advantage of her situation.

The actual payment of the nominal consideration expressed in a deed, is not necessary to the validity of such deed. It is sufficient if it is stated in the deed to have been paid, as the consideration thereof.

As between the parties to a conveyance, where a mere nominal consideration is expressed in such conveyance for the purpose of supporting it, a court ought not to allow proof to be given of the non-payment of any consideration, in order to destroy the deed.

The rule of the English common law, which disabled a feme covert from conveying her real estate in any other manner than by a fine, or a common recovery, was never in force in the state of New-York. At least no such law has been in

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existence here since the colonial act of May 6, 1691, was rejected by the crown, in 1697.

The act of February 16, 1771, to confirm certain ancient conveyances, and prescribing the mode of proving deeds, to be recorded, and all the subsequent statutes on the subject, are merely restrictive of the right which a feme covert possessed, by the common or customary law of the colony, to convey her estate by deed, with the concurrence of her husband.

A substantial compliance with the requirements of the statutes relative to the proof or acknowledgment of deeds is sufficient; and it is not necessary that the certificate of the acknowledgment should be in the precise words used in the statute.

Held, accordingly, that a certificate which stated that a feme covert acknowledged that she executed a deed *without any fear, threat, or compulsion of her husband*, was a sufficient compliance with a statute requiring an acknowledgment by a feme covert that she executed the deed *freely, without any fear or compulsion of her husband*.

The word *freely*, in the statute, is not used in a sense importing that the wife, in the execution of the deed, should act without a motive, or do it as a mere act of generosity, without any hope of present or future benefit. But it means that she has executed the deed without constraint or coercion, or fear of injury from the husband.

How far custom and usage may be applied to the construction of statutes respecting the proof and acknowledgment of deeds, and to the form of the certificate of acknowledgment.

Where real estate had come to the wife from her father and her grandfather, and she had conveyed it to her husband, through the medium of a third person, and the husband afterwards commenced a suit in chancery, in the name of himself and wife, for a partition of a part of the estate, and for other purposes, and the bill stated the original title of the wife to such real estate, without mentioning the subsequent conveyance of the property to the husband, and an interlocutory decree was made, declaring the rights of the complainants and defendants according to the case made by the bill; which suit was afterwards compromised and settled between the complainants and defendants, and mutual releases executed, conveying the interests of the defendants in certain portions of the property in controversy to the husband; *Held* that, as between the devisees of the husband and the heirs at law of the wife, the devisees were not estopped from showing that the lands actually belonged to the husband at the time of the filing of the bill, and at the time of the entering of the interlocutory decree in such suit.

THIS was an appeal from a decree of the late vice chancellor of the first circuit. Cornelius Cozine the elder, who died in 1765, owned a farm at Bloomingdale, containing about 100 acres. By his will he devised it to his five children, Garret, Cornelius, Balaam Johnson, Margaret, the wife of N. Fletcher, and Sarah, the wife of W. Swanston; and the location of the

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part intended for each was stated in the will. He also owned four lots in Fair-street, now Fulton-street, in the city of New-York; which he devised to his five children equally. But his will contained a contingent limitation over to the survivors of his children, who should be then living, in case any of the devisees should die without leaving lawful issue. Soon after his death his children caused their several portions of the premises at Bloomingdale to be located and ascertained, by the city surveyor, as directed by the testator. And the same were set off to them in severalty, according to the will. Each took possession of his share of that part of the testator's estate, and held the same in severalty. The share set off to the testator's son Garret, in that division, consisting of about twenty acres on the west side of Bloomingdale road, and extending westwardly to the Hudson river, was a part of the lands in controversy in this cause. In addition to the share of Garret Cozine in his father's estate, he had acquired, by purchase, forty-seven acres of land at Bloomingdale, and five lots on Mott-street in the city of New-York; which several parcels of land were also in dispute in this cause. Garret died about the year 1772, leaving three children; but by the death of two of them without issue, his daughter Catharine, the grandmother of the complainant, became the sole owner of the real estate which belonged to her father at the time of his death. In 1774, Catharine Cozine married Jacob Harsen, and had by him three children; Cornelius, John, and Rachel. John died in 1801, without issue. Rachel married Henry Jackson, and died about a year after her brother John, leaving two children; Anna Maria, the complainant in this cause, and Catharine, who subsequently married J. O. Fay. Mrs. Harsen died in May, 1835, and Jacob Harsen, her husband, in July of the same year; leaving their son Cornelius, and the two daughters of Rachel Johnson, their only heirs at law.

Cornelius Cozine, the brother of Garret, died in 1774, without issue. And upon his death, his brother Balaam Johnson entered upon the lands which had been set off to Cornelius in severalty at Bloomingdale; claiming to be entitled to them un-

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der the will of the latter. And he also took possession of the four lots in Fair-street; but he subsequently gave up the possession of three of the last mentioned lots to the heirs, or representatives, of his brother Garret and of his two sisters. He continued, however, in the possession of the lands set off to his brother Cornelius, at Bloomingdale, until the time of his death; claiming to hold the same under a deed from his father, to him and his brother Cornelius, and under the will of the latter. And his widow and children continued to claim the same after his death, and remained in possession thereof until the compromise of the chancery suit, as hereafter mentioned.

On the 28th of May, 1790, Jacob Harsen and Catharine his wife, for the nominal consideration of five shillings, as stated in the deed, conveyed to Gabriel Furman, the forty-seven acre lot at Bloomingdale, and the lots in Mott-street, owned by Garret Cozine in his lifetime, and the undivided part of the lands at Bloomingdale, and on Fair-street, to which Garret Cozine became entitled under the will of his father. This deed was acknowledged by Harsen and wife, before John Ray, a master in chancery, and was recorded in the office of the clerk of the city and county of New-York, in August of the same year. The certificate of acknowledgment of that deed was as follows:

"Be it remembered, that on the 29th day of May, in the year of our Lord 1790, before me John Ray, one of the masters in chancery for the state of New-York, personally appeared Jacob Harsen and Catharine his wife, and the said Jacob Harsen acknowledged that he sealed and delivered the within written indenture, as his voluntary act and deed for the uses and purposes within mentioned; and the said Catharine being examined by me, privately and apart from her husband, *acknowledged that she executed the same without any fear, threat, or compulsion of her husband*; and I having perused the said indenture and find therein no material errors or interlinations, except the words "feet six" on the fifty line, same page interlined, do allow the same to be recorded. JOHN RAY."

On the 29th of May, 1790, Furman and his wife, for the nominal consideration of ten shillings, conveyed the same prem-

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ises to Jacob Harsen in fee, by a deed of that date; which deed was also acknowledged before Master Ray, and was recorded at the same time as the other conveyance.

In 1794, Harsen and his wife, together with the heirs and representatives of Mrs. Fletcher and of Mrs. Swanston, the two daughters of Cornelius Cozine the elder, filed a bill in chancery against the widow and heirs of Balaam Johnson Cozine, to set aside a pretended deed from Cornelius Cozine the elder, to his sons Cornelius and Balaam Johnson, for the Bloomingdale farm; to be let into possession of three-fourths of the share which was devised to Cornelius Cozine the younger, by the will of his father, in the Bloomingdale farm and in the four lots in Fair-street; and for an account of the rents and profits thereof which had been received by the husband and father of the defendant, in his lifetime, or by them after his death; to have the amount of a debt which Garret Cozine became liable to pay for his father, and which Harsen and wife had been obliged to pay, declared a lien upon the estate of Cornelius Harsen the elder, and to compel the defendants to contribute their rateable proportions for the payment of that debt; and for a partition and sale of the lots in Fair-street. The bill also contained a prayer for general relief. That cause was brought to a hearing upon pleadings and proofs. And in July, 1808, Chancellor Lansing made an interlocutory decree therein, establishing the will of Cornelius Cozine the elder, and declaring that the farm at Bloomingdale became vested in his children under the will, and according to the allotment therein; subject to the limitation over if any of them died without issue. That decree further declared, that Harsen and wife, in her right, were entitled to the part of the farm which was specifically devised to Garret Cozine; that the complainants Hegeman and wife were entitled, in her right, to the part specifically devised to Mrs. Fletcher; and the complainant Sarah Starke to the part specifically devised to Mrs. Swanston; that each of them was in the same right entitled to one-fourth of the part specifically devised to Cornelius Cozine the younger; and that the defendants were entitled to the part specifically devised to Ba-

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laam Johnson Cozine, and to one-fourth of the part specifically devised to Cornelius Cozine the younger ; and that a commission be issued to make partition accordingly. The parties were by the decree declared to be each entitled, in the same rights, to one-fourth of the Fair-street lots, and it was referred to a master to ascertain and report whether those lots were capable of being divided without injury to the parties. The master was also directed to take an account of the rents and profits, and by whom received, and an account of the moneys due to Harsen and wife for payments made on account of the debt for which Garret Cozine was surety. And further directions were reserved until the coming in of the report. The defendants having intimated that they should appeal to the court for the correction of errors, the parties finally entered into a compromise ; and in consequence thereof the suit was not prosecuted any further. The substance of that compromise, which was consummated in February, 1809, was that mutual quit-claims should be executed for the several portions of the Bloomingdale farm specifically devised, except as to the share which formerly belonged to Cornelius Cozine, the younger ; which share they divided in certain proportions agreed upon. And mutual releases for rents and profits received were to be given. It was also agreed that the Fair-street lots should be sold, and the costs of the chancery suit and other expenses paid out of the proceeds ; and that the residue of such proceeds should be divided by paying over one-fourth to Jacob Harsen, one-fourth to Hegeman in right of his wife, as the heir of Mrs. Fletcher, one-fourth to the heirs of Mrs. Swanston, and the other one-fourth to the defendants in that suit. That agreement was executed by all the parties, including Mrs. Harsen ; and was duly acknowledged by them before a master in chancery on the 9th of February, 1809. On the same day, the other parties to the suit, except Mrs. Harsen, gave to Jacob Harsen the husband, a release and quit-claim of all their rights, interests, and claims to the twenty acres at Bloomingdale, which were devised to Garret Cozine by his father, and to about ten acres on the opposite side of the Bloomingdale road ; as his share of the part devised to Corne-

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lius Cozine the younger. The last mentioned ten acres was a few days afterwards conveyed by Harsen and his wife to their son Cornelius. In October, 1804, the corporation of the city gave to Jacob Harsen a water grant of lands, under the waters of the Hudson river, opposite his lands at Bloomingdale which originally came to his wife from her father, and her brother and sister. And in 1817, part of the lots in Mott-street were taken for the purpose of widening that street; and Harsen received from the corporation, as the damages sustained by the taking of the part of the Mott-street lots for that purpose, the sum of \$6530. Upon the death of Mrs. Jackson, her two children, the complainant and her sister Catharine, being then in their infancy, were taken into the family of their grandfather Jacob Harsen; and continued to live with, and were supported by him until his death, with the exception of a very short interval between the marriage of the complainant and her divorce from her husband.

In March, 1835, about four months before the death of Jacob Harsen, and about six weeks before the death of his wife, he made and published his will, in the presence of three subscribing witnesses; by which he disposed of his property as follows: He gave to his wife all his household furniture, plate, stock, and other personal property in and about his mansion house and the premises where he then lived, and all the money that she might have in her possession, custody or care, at the time of his death; and he forbid his executors from calling her to account for the same. He also gave her a pecuniary legacy of \$3000, to be paid to her immediately upon his death. And he devised to her, for life, his mansion house, and the fifteen acres of land upon which it stood; it being a part of the forty-seven acre lot at Bloomingdale, which originally came to her from her father, and from her brother and sister who died without issue. She was also to have the privilege of cutting fuel from an adjoining wood lot. These several bequests and provisions were, by the will, declared to be in lieu and bar of her dower in his estate. He then devised to his son Cornelius, in fee, certain wood land in the state of New-Jersey. He also devised to him for life.

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several of the Mott-street lots at the corner of Mott and Chatham streets, part of the lands which came to the testator's wife from her father and from her brother and sister; to hold the same to the devisee for life, with remainder to his seven children; the shares of two of those children being vested in his executors as trustees for the lives of the cestuis que trust respectively, with remainder to their children. And he devised the residue of his lot in Mott-street, which came to his wife from her father and brother and sister, together with another lot on the opposite side of the street, to his executors, during the lives of his two granddaughters, the complainant and her sister Catharine, and of the survivor of them; in trust to receive the rents and profits thereof and to divide the same equally between them during their joint lives, for their separate use; and after the decease of either, to pay over the one-half of the rents and profits to the survivor for life, and the other half to the children of the testator's son Cornelius, during the same period; limiting the remainder in fee in that part of his property, after the death of the complainant and her sister Catharine, to the seven children of his son Cornelius.

He then devised in fee, to his grandson Doct. Jacob Harsen, one of the sons of Cornelius, his mansion house and a part of the forty-seven acre lot at Bloomingdale, subject to the life estate of the testator's wife in the mansion house and the fifteen acres of land occupied therewith; with a limitation over to his brothers and sisters in case he should die, without leaving issue, during the life of the testator. Another portion of the forty-seven acre lot at Bloomingdale, he devised to his executors, during the life of his grandson John P. R. Harsen, in trust to receive the rents and profits thereof and pay the same to his said grandson during his natural life. And after the grandson's death, he devised the same lands to such of the children of the said John P. R. Harsen, as should then be living, and to the descendants of such as should be dead leaving issue, per stirpes; with a limitation over in case of his death without issue.

His water lot at Bloomingdale, conveyed to him by the cor-

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poration of New-York, in October, 1804, the testator devised to his two grandsons, Doct. J. Harsen and John P. R. Harsen, as tenants in common ; and in case of the death of either in the lifetime of the testator, and without issue, the whole to go to the survivor. The twenty acre lot at Bloomingdale which was specifically devised to Garret Cozine, by the will of Cornelius Cozine his father, with the exception of the part of that lot which lies between the ninth and tenth avenues, the testator devised to the seven children of his son Cornelius ; giving the shares of two of them to his executors in trust. And as to the part of the twenty acre lot between the ninth and tenth avenues, it was not disposed of by the testator ; his will containing no residuary devise of his real estate.

After giving certain legacies and bequests out of his personal estate, the testator bequeathed two-thirds of the residue thereof to his executors, in trust to invest the same, and pay one half of the income thereof to the complainant, and the other half to her sister Catharine during their respective lives ; and to pay over the one half of the principal, upon the death of each of those granddaughters, to the children of his son Cornelius who should then be living. The remaining third of his residuary personal estate, the testator bequeathed to his grandson Doct. Jacob Harsen. And he appointed that grandson and the defendants J. A. Middleberger and J. Cockroft, his executors and trustees.

The will of Jacob Harsen was duly proved before the surrogate of New-York, as a will of real and personal-estate, upon a contestation thereof by the complainant ; and was allowed and admitted to record, by the surrogate, in October, 1835. And Middleberger and Cockroft assumed the execution thereof as executors and trustees.

In June, 1836, the complainant filed her bill in this cause against the executors, and against Cornelius Harsen and his children, and against her sister Catharine, and John O. Fay who had married such sister subsequent to the death of her grandfather. In this bill the complainant, among other things, alleged that the deed of the 28th of May, 1790, purporting a

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have been executed by Jacob Harsen and wife to Gabriel Furman, was never executed by Mrs. Harsen ; or, if it was, that it was obtained from her by the fraud and deceit of her husband, and was executed without her being aware of its nature and effect ; and that it was delivered to the grantee conditionally, or in the nature of an escrow, and that the event upon which it was to take effect never occurred, as contemplated by the parties. She also insisted that the deed was not duly acknowledged, by Mrs. Harsen, so as to pass her title to the premises therein described to the grantee. She also set up the suit in chancery, commenced by Jacob Harsen and wife and others, in 1794, against the widow and heirs of Balaam Johnson Cozine, and the interlocutory decree made in that suit, as an estoppel to the claim of Jacob Harsen that the legal title to the lands, which formerly belonged to his wife, was in him by virtue of the conveyance to Furman and the reconveyance to himself. And she also charged that the release and quit-claim, of February, 1809, of the twenty acre lot at Bloomingdale, and of the ten acre lot at the same place, which were given to him by the other parties, in his own name, upon the compromise of the chancery suit, were taken by him in fraud of the rights of his wife under the decree. She also insisted that the grant of the water lot, from the corporation, taken by Jacob Harsen in his own name, in October, 1804, could not properly be made to any person other than the owner of the adjacent lands ; and that it was obtained by Jacob Harsen under the pretext of his being the owner of such adjacent lands. The complainant therefore charged, that it was a fraud upon the rights of the heirs at law of his wife, for him to claim the water lot as against them ; and that the complainant was entitled to the one undivided fourth part thereof. She also claimed, by her bill, that the damages received by Jacob Harsen, for the lands taken upon the widening of Mott-street, should be considered as real estate ; and that she was entitled to the one-fourth part thereof, as one of the heirs of her grandmother Catharine Harsen. The complainant also charged, in her bill, that the will made by Jacob Harsen was invalid ; that he was not of sound disposing mind, nor

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competent to make a valid will, at the time of the date of his pretended will; and that he was induced to make it by fraud and undue influence. She therefore prayed that the defendants might be decreed to deliver up the several deeds and releases to be cancelled; and that they might be decreed to convey to her the one-fourth of the lands described in the bill as formerly belonging to her grandmother Catharine Harsen, and that she might be quieted in her possession thereof; that she might be decreed to be entitled to one-fourth of the lands in controversy, and the one-fourth of the rents and profits thereof; that Jacob Harsen might be declared to have been seised of the water lot in trust for his wife, with the same beneficial interest in her that she had in the adjacent lands, and that the complainant might be declared entitled to one-fourth part thereof; and that one-fourth of the moneys received by Jacob Harsen for the damages, upon the widening of Mott-street, might be decreed to her, as a part of the real estate which belonged to her grandmother. She also prayed for an injunction and receiver, and for general relief.

Catharine Fay and J. O. Fay her husband, put in an answer admitting all the allegations in the bill, and concurring in the prayer thereof. The infant defendants put in general answers by their guardian ad litem. The other defendants put in answers denying that the conveyances of May, 1790, were not duly executed, or that they were obtained by fraud, or that the releases, conveyances and agreement, upon the compromise of the chancery suit, were fraudulent, or that Mrs. Harsen did not fully understand the same. And they insisted that the deed of May, 1790, was duly executed and acknowledged, in due form of law to pass her title to the lands described in that deed; and that the will of Jacob Harsen was properly executed, and that he was competent to make it. They also insisted that the complainant had a perfect remedy at law, if the allegations in her bill were true; and that the court of chancery ought not to entertain jurisdiction of the case. Replications to the answers of the several defendants were filed, and the parties proceeded to take their proofs.

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Doct. Jacoo Harsen, one of the defendants, having brought an ejectment suit against the complainant, to recover the possession of some of the lands devised to him by the will of his grandfather, she applied for an injunction to stay his proceedings in that suit. And in February, 1837, the vice chancellor before whom the bill in this cause was filed, granted an injunction; with liberty to the plaintiff to proceed to trial and judgment in the ejectment suit, for the purpose of trying the questions as to the validity of the deed of 1790, and the validity of the will of Jacob Harsen deceased; but without prejudice to the equitable rights of the complainant in respect to the charge of fraud in obtaining the execution of the deed of May, 1790. That ejectment suit was brought to trial, in the superior court of the city of New-York, in November, 1837; and a verdict was found for the plaintiff, subject to the opinion of the court upon a case to be made. And the superior court afterwards gave judgment in his favor, against the complainant Anna Maria Meriam.

In October, 1838, Cornelius Harsen died; and shortly afterwards Mrs. Prall, one of his daughters, also died, leaving several children surviving her, who thereby became interested in the subject matter of the litigation in this suit, under the will of Jacob Harsen. The suit was therefore revived against those children, and against the devisees of Cornelius Harsen, by a bill in the nature of a bill of revivor and supplement. The cause was subsequently heard before the late vice chancellor of the first circuit, upon pleadings and proofs. He decided that the deed of the 28th of May, 1790, from Jacob Harsen and wife to Gabriel Furman, was duly acknowledged by Mrs. Harsen so as to pass and convey the real estate mentioned in the deed; that the deed was executed by her, and that it was not obtained by fraud or improper means; that by the conveyance of the premises by Furman and wife to Jacob Harsen, the latter became seised thereof in fee, for his own use, and that his title was not impaired nor affected by the proceedings and decree in the chancery suit commenced in 1794; and that the will of Jacob Harsen was valid and properly executed. He therefore

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made a decree dismissing the bill of the complainant, with costs to all the defendants except Fay and wife. From this decree the complainant appealed to the chancellor.

Wm. S. Johnson, for the appellant. The deeds from Jacob Harsen and Catharine his wife to Gabriel Furman, and from Furman and wife to Jacob Harsen, of the 28th and 29th May, 1790, did not pass the estate of Mrs. Harsen, to her husband, so that the same is governed by his will; but that estate has descended to Mrs. Catharine Harsen's heirs at law. A wife may give her estate to her husband, but the act is to be looked at with jealousy. (*Hulme v. Tenant*, 1 Bro. C. C. 16. *Ferris v. Brush*, 1 Edw. Rep. 572.) There must be no compulsion. (*Whitehall v. Clark*, 2 Id. 149.) It must be narrowly watched. (*Bradish v. Gibbs*, 3 John. Ch. Rep. 523, 549.) There must be no fraud or unfair advantage. (*Jacques v. The Methodist Church*, 17 John. Rep. 458, 598.) The cases on this subject are reviewed by Lord Eldon, in *Parker v. White* (11 Ves. 222.)

The deed of Harsen and wife to Furman, of 28th May, 1790, was not duly acknowledged by Mrs. Harsen, nor is there a proper certificate of her acknowledgment under the act of 26th February, 1788, so as to pass her real estate. (2 Greenl. Laws, 99, § 3.) She did not acknowledge it *freely*. There is nothing in the certificate purporting her voluntary act. The defendants claim that the certificate is not only according to the statute, but also to the usage under the statute, and to the contemporaneous construction of the law. That it is substantially correct, and that it was not usual under the statute to insert the word *freely*. This form of certificate of acknowledgment by *femes covert* is prescribed by the statute, but not so as to other parties. (*Jackson v. Philips*, 9 Cowen, 111.) At the common law, conveyances by *femes covert* could only be made valid by matter of record founded upon an examination in open court. (*Walk. Conv.* 299.) In this state a private examination is allowed. By the Duke of York's charter, no estate of a *feme covert* could be sold or conveyed, except by deed, acknowledged by her in court,

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of record; she being *secretly* examined whether she does it freely, without threats or compulsion of her husband. (2 R. L. of 1813, App. V.) The same language was used in the bill of rights of 1691. (See *Bradf. ed. Col. Laws*, p. 4; *Stat. of 1771*, V. S. ed. 611, § 2.) The act of 1778 improves the language of the act of 1771.

I find but one case in our own reports upon the statute as to conveyances by *femes covert*. (*Jackson v. Gilchrist*, 15 *John. Rep.* 89.) That was on a deed made in 1711. The separate examination of the wife, whose estate was conveyed, was not certified. But it was held good, because there was no statute regulation on the subject. There are, however, several cases in other states, than New-York. See the case of *Lessees of Watson v. Bailey*, (1 *Binn.* 470.) Yeates, J. said a literal strict adherence to the very words of the statute was not necessary, but the substantial requisites should be pursued. (See also *Tod v. Baylor*, 4 *Leigh*, 498; *Harvey v. Peck*, 1 *Munf.* 538; *Green v. Branton*, *Dev. Eq. Rep.* 500.) The cases relied upon by defendants, are the following, and are thus classified: Those where the acknowledgment was held good on the ground of usage, and to quiet titles. 1. Where the officer had omitted words indicating that the person acknowledging was the party described in the deed. (*Jackson v. Gumaer*, 2 *Cowen*, 552. *Troup v. Haight*, 1 *Hopk. Rep.* 239. *Thurman v. Cameron*, 24 *Wend.* 87. *McLean v. De Lancey's Lessees*, 5 *Cranch*, 30.) 2. Where the proof stated in the certificate was defective because the witness was not stated to be known to the officer, but the proof was certified to be satisfactory to the officer. (*Jackson v. Livingston*, 6 *John. Rep.* 149. *Jackson v. Harrow*, 11 *Id.* 434. *Jackson v. Vickory*, 1 *Wend.* 406.) 3. Cases arising under the acts of 1771 and 1778. (*Jackson v. Schoonmaker*, 2 *John. Rep.* 230.) Certificate of 1750. (*Jackson v. Gilchrist*, 15 *Id.* 89.) Certificate of 1711. (*Jackson v. Philips*, 9 *Cowen*, 96, 211. *Bradstreet v. Clarke*, 12 *Wend.* 602, 612.) Certificate of 1790. 4. Cases where the certificates of acknowledgment were held to be insufficient. (*Jackson v. Osborn*, 2 *Wend.* 555. *Jackson v. Gould*, 7 *Wend.* 364.)

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The general rule to be adduced from the cases is, that if the requirements of the statute have been substantially complied with, and usage has sanctioned the form, the certificate and execution are to be held good. The substantial requirement is, that the act of the wife shall be her voluntary, unrestrained, unbiassed, gracious, free act and deed. It requires more freedom in the wife, than that which exists in the absence of fear, threat or compulsion. If no more was meant, the word freely, would be useless in the act. *Freely*, as an English word, means more than the absence of fear, threat and compulsion. *Free*, not being under necessity or restraint, physical or moral. Gratuitous, not gained by importunity or purchase. Freely, without restraint, constraint or compulsion, voluntarily, spontaneously, without constraint or persuasion, gratuitously, of free will, grace, without purchase or consideration. (*Webster's Dict.*) Thus the language of this certificate does not satisfy the words of the statute in their proper English sense. It does not satisfy all the words of the statute. There is nothing in the certificate purporting a voluntary, spontaneous, gratuitous, gracious act of the wife, or freedom of action, though such words are used as to Mr. Harsen, to wit: voluntary act, &c.

The facts warrant the presumption that such words indicative of free action, were intentionally omitted, lest the certificate should be untrue in fact. In the certificate of acknowledgment by Furman and wife, made on the same day, before the same officer and doubtless at the same time, both parties acknowledge the deed as their voluntary act. Again, Mrs. Harsen was tenacious of her patrimony. She did not like Mr. Harsen's selling her property. She consulted no near relation as to the conveyance to Furman. She always asserted her ownership. It was herself who gave the land to her son Cornelius; and she was very anxious that her estate should remain in the family. The Furman deeds remained *sub rosa*, until after that suit ended in 1808 or 1809. Usage has not sanctioned this form of certificate. The maxim *communis error facit jus* does not therefore apply. The records of deeds have been extensively examined in New-York and in the office of the secretary of state. The

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exhibits produced on the part of Fay and wife, show 213 certificates by Ray, from 1774 to 1803, of acknowledgments by the husband and wife recorded in the office of the secretary of state, and 837 recorded in the register's office in New-York from 1785 to 1805. Of these, 1043 are substantially correct. They show the voluntary act of the wife, either in the clause as to the acknowledgment both of the husband and wife, or as to the wife alone. And seven only are imperfect. Of these the Harsen deed is one. The exhibits of the other defendants show 660 certificates of acknowledgment under the act of 1788, in which the word freely is left out. But in these, some other word, importing voluntary action is substituted. I conclude, therefore, that the substantial requirement of the statute, that the wife should acknowledge that she *freely* executed the deed, was not complied with. The master's certificate does not comply with the requirement of the statute, by certifying that the wife did freely execute. Usage has not sanctioned the form of certificate used. The presumption from the evidence is that Mrs. Harsen did not execute the deed freely, in the sense of the statute. This last inference will appear more forcible in the consideration of the next position.

The conduct of the parties after the execution of the Furman deeds, proves that in their estimation, they were of no effect. That they were abandoned, or become inoperative, as on failure of the condition of an escrow. The deeds were made on the 28th and 29th days of May, 1790, and were recorded in August, in the same year. In 1794, Harsen and wife, with others, filed their bill in partition, and a final decree was made therein on the 13th of July, 1808. That bill and the decree in partition made thereon were clear recognitions of Mrs. Harsen's title, and estopped Jacob Harsen, and all claiming through him as volunteers, from denying the fact. The bill in that suit is based on the title of Mrs. Harsen to the property, as her patrimonial estate, and related to the same lands; and the decree affirmed the title to be in her. The averments in that bill were precise and affirmative, and the matter of those averments was traversable. They must therefore be taken to be true; and Jacob Harsen,

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and those who claim through him, cannot be permitted now to deny them. (4 *Kent's Com.* 261, n. 2 *Prest. Ab.* 206 to 209, 213. *Wood v. Jackson*, 8 *Wend.* 9. *Elliott v. Hamilton*, 1 *N. Hamp. Rep.* 182.) The releases after the decree in partition, are not answers to this our claim of recognition and estoppel. Mrs. Harsen, as a feme covert, was not bound by the recitals in the agreement as to the Fair-street property. She would not be estopped by her covenant. (*Jackson v. Van derheyden*, 17 *John. Rep.* 167. *Martin v. Dwelly*, 6 *Wend.* 9, 14. *Butler v. Buckingham*, 5 *Day*, 492. *Watrous v. Chaulker*, 7 *Conn.* 224.)

The releases were, or ought to have been made, in pursuance of and in execution of the decree. If they were so they vested the title in the husband for Mrs. Harsen's benefit and Jacob Harsen took it under the release of 9th February, 1809, as a trustee for his wife. But if they were not made in execution of the decree, then Mrs. Harsen executed the agreement only in respect to her dower. If Jacob Harsen is not bound by his pleading as to the title of his wife, how can she be bound by a recital in a contract executed by her when covert?

We claim the title on the broad ground that, by construction of law, and more especially of equity, the Furman deeds, if well executed, vested in Jacob Harsen only a life estate; a marital estate for the benefit of himself and wife for his life, remainder on his death in fee to the heirs at law of Mrs. Harsen. There was no consideration passed for the deeds. A nominal consideration of five shillings only is stated therein. There was no settlement by Mr. Harsen on his wife, for he was too poor to make one. A wife may give her estate to her husband. But the particular act is to be looked at with jealousy. (2 *Kent's Com.* 166.) A wife may bargain with her husband for transfer of property from him to her, if for a bona fide and valuable consideration. (*Livingston v. Livingston*, 2 *John. Ch. Rep.* 537. *Lady Arundell v. Phipps*, 10 *Ves.* 139, 145, 146, 149. *Bullard v. Briggs*, 7 *Pick. Rep.* 533. *Garlick v. Strong*, 3 *Paige*, 440. *Ritchin v. Broadbent*, 2 *Jac. & Walk.* 455.)

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And she may sell or mortgage her separate property for her husband's debts. (2 *Kent's Com.* 167.) But as between husband and wife, the debt will be treated as the husband's, and she will be entitled to payment out of his estate. (*Clinton v. Hooper*, 1 *Ves. jr.* 186. *Niemcewicz v. Gahn*, 3 *Paige*, 614.) In the case of *Milnes v. Busk*, (2 *Ves. jr.* 488,) a wife who was entitled to the income of real estate as her separate property, appointed her husband to receive it, during her life. On a bill, by the husband's heirs, to have this income declared a part of his personal estate, it appeared that the husband consulted an attorney who devised this instrument; and he got the wife to execute it. And Lord Rosslyn decreed the income of the estate to belong to the wife. There, as in this case, they had lived on good terms, and the object of the appointment was to give the husband the management of estate. There were no words of conveyance, but his lordship said that if there were words of conveyance, under the circumstances he should set it aside. He says, a wife is not a *feme sole* as to her separate property in respect to her husband. It is against all the maxims of the common law. And he cites *Pawlet v. Delaval*, (2 *Ves.* 663.) In that case a separate estate of £23,000 came to Lady Pawlet. It was first settled as her separate estate; and it was afterwards invested for their joint benefit. After the death of Lord Pawlet, Lady Pawlet administered and treated half this sum as Lord Pawlet's. On the second marriage of Lady Pawlet with Delaval, this sum was by deed declared to be a part of the estate of Lord Pawlet. A bill by Delaval and wife to set aside this deed was dismissed. Lord Hardwick held the deed good; and that the money was part of Lord Pawlet's estate. But it was on the ground of Lady Pawlet's treatment of it while sole. In *Pybus v. Smith*, (1 *Ves. jr.* 189,) Mrs. Vernon appointed her trustees to pay her income for her husband's debt. Lord Thurlow directed an inquiry, as to how the deeds were executed. And it appearing by the report of the master that the wife knew what she was about, the deeds held good. (See also *Chassaing v. Panson*.)

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age, 5 Ves. 17. *Whistler v. Newman*, 4 Id. 129. *Parker v. White*, 11 Id. 209. *Ellis v. Atkinson*, 3 Bro. C. C. 565.)

Resulting trusts are implied by law from the manifest intentions of the parties, and the nature and justice of the case. As where the consideration is paid by one and the deed taken in the name of another; where the title is obtained by fraud; and where there is a purchase by a trustee with trust money, or a renewal of a lease by the trustee. So also where the purpose for which the estate was conveyed has failed, or a surplus remains after the purpose of the conveyance is effected. (*Randall v. Bookey*, Prec. Ch. 162. *Emblyn v. Freeman*, Id. 541. *Stonehouse v. Evelyn*, 3 P. Wms. 252. *Digby v. Legard*, Id. 22, n.) And the facts showing the resulting trust may be established by parol. (4 *Kent's Com.* 305. *Willis v. Willes*, 2 Atk. 71. *Bartlett v. Pickersgill*, 1 Edw. R. 515. *Boyd v. McLean*, 1 John. Ch. 582. *Botsford v. Burr*, 2 Id. 405. *Sterrit v. Steve*, 5 Id. 1. *Dorsey v. Clark*, 4 Harr. & John. 551. *Hall v. Spring*, 7 Mart. Louis. Rep. 243. *Powell v. Monson*, 3 Mason, 362, 3. *Start v. Canrady*, 3 Littell, 399.) In the case of *Strickland v. Aldridge*, (9 Ves. 519,) there was a devise to defendant on a secret trust to build a chapel, against the statute of mortmain. And it was held that the grantee, on the ground of the fraud, took the estate in trust for the heir of the testator. In *Baldwin v. Rochford*, (1 Wils. Rep. 229,) where sailors sold their right to prize money, the lord chancellor said, "Here is presumption of fraud, arising from the circumstances appearing in the cause—the great value of the thing sold, in proportion to the small price paid for it. By the Roman law the contract was void, if the consideration was less than half the value of the property. Mere inadequacy of price was not alone sufficient to set aside a contract."

J. W. Gerard, for the respondents. By Mrs. Catharine Harsen's deed to Gabriel Furman, dated 28th May. 1790, and the deed from Furman and wife to the testator, Jacob Harsen. the next day, acquired a perfect title in fee to the lands of Mrs. Harsen therein described. This mode of conveyance, as is to

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vest the lands of a feme covert in her husband, always existed in the colonies, and has become one of the common assurances of land, under which numerous titles are held. And by the usages of the colonies of New-York, Pennsylvania and others, no acknowledgment of the wife, before any magistrate, was requisite to give validity to the deeds. Our acts requiring a private examination of the wife, were not passed to enable her to convey, but to restrain her conveyance from operating unless duly acknowledged. This was decided by the court of errors, in *Constantine v. Van Winkle*, (6 *Hill's Rep.* 177.) I shall therefore make no argument on this point, but simply refer to the cases below. It is not averred in the bill, that by law the husband cannot thus become seised of the lands of the wife. But if it was, the law is well settled the other way. (*Jackson v. Stevens*, 16 *John.* 110.) Stebbins, senator, there says, an indirect mode of conveyance is no fraud upon the law, when resorted to in order to remedy a want of capacity to convey directly. (2 *Kent's Com.* 151, 2d ed. *Reeve's Dom. Rel.* 106, 114. *Grout v. Townsend*, 2 *Hill's Rep.* 556. 1 *Dallas*, 11, 17.) The act of 1771, (3 *R. S. App. p.* 22,) shows that the custom in this country in the colonies, was for femes covert to pass away their estate without any acknowledgment.

The deed of Mrs. Harsen was properly acknowledged by her, under the act of 26th February, 1788, (2 *Greenl. Laws*, 99,) before John Ray, master in chancery, who allowed the deed to be recorded; the act being substantially complied with. In *Jackson v. Phillips*, (9 *Cowen*, 111,) it is held that the act does not prescribe the form, but the substance of the certificate of the officer. The same case shows that the identity of the parties need not be stated in the certificate, nor that the officer knew the witness, nor the witness the party. The question is *res adjudicata* between Jacob Harsen and the complainant, by the ejectment suit in the superior court, where the acknowledgment was held good. The act does not say freely *and* without the fear or compulsion of her husband. If therefore she did it without the fear or compulsion of her husband, she did it freely. It is a conclusion of law from the facts. 7 *Mass. Rep.* 14. 2

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Id. 291. 5 *Id.* 438. 9 *Id.* 161. 2 *Kent's Com.* 150, *ed. of* 1844.) The word *freely* is not in the certificate, and the word *thereto* is used in addition. The law meant to guard against the coercion of the husband alone. *Freely* is an inference of law; therefore the act does not say *freely and* without the fear or compulsion of her husband; but *freely*, without the fear or compulsion of her husband. The act need only be substantially complied with, not literally. (6 *John.* 149.) The act of 1801 required the witness to prove the identity of the grantor. The witness said he sincerely believed, and was almost confident of the identity of the grantor. And the master being satisfied, it was held good proof. In *Jackson v. Gilchrist*, (15 *John.* 89,) the deed was acknowledged in 1711, and omitted to state a private examination of the wife, and the certificate of the justice stated, that in 1711 A. and B. his wife came before him to acknowledge the indenture to be their acts and deeds. And it was held that it ought not to be understood to mean merely that the parties came before him to acknowledge the deed, but that they did acknowledge it; and that after a long time the private examination of the wife ought to be presumed. In *Jackson v. Gumaer*, (2 *Cowen*, 552,) the officer merely stated that the grantor was known to him; without saying, known to be the person described in and who executed the mortgage, as the law required to be inserted in the certificate. But it was held sufficient. And the court say the omission of that clause having been extensively practised in the state, so that many titles would be disturbed, by allowing it to affect the certificate, would perhaps amount to a construction of the act. At all events, it would render the court unwilling to listen to an objection for that cause. In the case of *Troup v. Haight*, (1 *Hopk. Rep.* 239,) there was a similar omission in the certificate. And the certificate was held good, under extensive usage. That long usage has great weight in the construction of the act, especially if many law officers have adopted it, appears from Chancellor Sanford's opinion in that case. As respects the language generally used in certificates, our exhibit No. 34 contains 660 acknowledgments, under the act of 1801, in which th

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word *freely* is omitted. Some of these acknowledgments were taken before the highest judicial officers in the state. Our exhibit No. 35 contains 261 acknowledgments, where the private examination of the wife, and which is all that is operative against her, is in the precise words of the one in question. To hold this acknowledgment bad, would overturn hundreds of titles in the state, and produce extensive mischief. The presumption is that every officer does his duty. Master Ray was satisfied that it was her *free* act; for on her acknowledgment he allowed the deed to be recorded. (*See Comyn's Dig. Franchise, C.*; *Dwarris on Stat.* 693; *2 Harris & McHenry*, 19; *4 Halst. Rep.* 225.) If the complainant relies on the case of *The Lessee of Watson v. Bailey*, (1 *Binn.* 470,) the answer is that the acknowledgment in that case was not a substantial or attempted compliance with the statute, but was in a form which the statute had expressly abolished. The court there recognized a substantial compliance as being sufficient. The judge also recognized the maxim, *communis error facit lex*. And he said if his decision would unsettle many estates, he should pause long before he gave the decision. In *Kirk v. Dean*, (2 *Binn.* 341,) the point came up whether it applied to cases of dower. Two judges held it did; but Yeates, J. who decided the former case, true to his position that he would not make a decision to unsettle many estates, dissented. All the cases in Pennsylvania hold that a substantial compliance with the act is sufficient. In the case of *The Lessee of McIntyre v. Ward*, (5 *Binn.* 296,) the certificate omitted what the act required, that the judge should read to the wife, or otherwise make known to her, the full contents of the deed. The court say it is enough if in any manner it appears the contents were made known to her; the words of the act need not be used, if its directions are substantially complied with. In acknowledging she conveyed the lands within mentioned, it is to be presumed the lands were mentioned when taking the acknowledgment, though not so stated in the certificate. In *Shaller v. Brand*, (6 *Binn.* 438,) where the law required that the wife should have executed it voluntarily and of her own free will and accord, without coercion or

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compulsion of her husband, not one of these words was in the certificate. It only stated, after the contents were made known to her, that she voluntarily consented thereto.

The receipt of the five shillings consideration money being acknowledged in the body of the deed to Gabriel Furman to have been received from him, under seal, and also a separate receipt for it endorsed under seal, the complainant is precluded from charging or proving that it was not paid, or from inquiring into the same; the acknowledgment in the deeds and in the separate receipt being *conclusive evidence* of its payment, against the grantor and all claiming under her. In a deed of gift, not founded in fact upon a pecuniary consideration, or a consideration of blood or marriage, but consummated by merely inserting a nominal sum of money, the *actual* payment of such consideration, the grantor and those claiming under him, will not be permitted to disprove. (*Bank of U. S. v. Houseman*, 6 Paige, 527. 2 Hill, 556.) Here there is no proof that it was not paid. And if such proof were allowed, half of men's contracts would be nullified. For the nominal consideration is never paid.

The averment in the amendment to the bill, that the deed from Mrs. Harsen to Gabriel Furman is a forgery, is false and is not pretended to be supported by any proof. So also as to the averments that the deed was never delivered; or that it was delivered in escrow, or upon some condition that has never occurred, or upon some trust.

The averment in the bill, that the deed of Mrs. Harsen to Gabriel Furman was obtained by fraud and deceit, of her husband, the testator, is also false; and it is not pretended to be supported by any proof. Who is it makes these charges of forgery and fraud upon this estimable man? Who traduces the dead by the vilest slanders? His own grandchildren who insulted him while living! Their relative, who fed and clothed and educated them through life, and who, on his death, left for them an ample competence. No man, woman, or child has dared to breathe a word of fraud or deceit against him, but his own unnatural descendants;—the Regan and the Goneril of

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this drama ;—the modern Tarquinia, who profaned the sacred person of her aged grandsire when alive, and whom she now vilifies, and charges with every horrible crime, the moment the grave receives him. Let us examine the parties to this fraud :

1. Mrs. Harsen, a strong minded, intelligent woman ; not a bride, as the counsel once said, but a staid matron sixteen years married ; who having well tried him, had entire confidence in the character and prudence of her husband. 2. Mr. Harsen, then in the prime of his life, and in high character and standing ; a man of the most correct and honorable character, whose reputation through life has been proved by a phalanx of witnesses of characters equal to his own ; that he should turn recreant to the tenor of his whole life, and select as the victim of his fraud her, who of all others, he was bound to protect. Who speak disrespectfully of him ? Only the parties to the old chancery suit, and their descendants—no other individuals. 3. Mr. Gabriel Furman was to be the instrument of his fraud. His and her personal friend and associate. One of our most estimable men. Also, Mrs. Furman, his wife. 5. John Ray, the master. The fraud could not be committed without his connivance. A most honorable man, and exemplary officer. Also, the witnesses North and Hughes must have connived at fraud in the execution of the deeds. The deeds are large—there must have been great parade in their execution—seven persons were present. Mrs. Furman and Mrs. Harsen, if they did not know what they were about then, must have talked of it a hundred times, and Mrs. Furman would have asked her husband for explanations. And if he found that Mrs. H. did not understand what she had done, something would have been said. Inquiry would have been made. It was impossible to have deceived Mrs. Harsen into the execution of the deed.

The allegations in the bill, that Mrs. Harsen, till her death in 1835, treated the land as her own ; receiving the rents, acting as if it were her own, and exercising control ; and also, that Jacob Harsen, her husband, did not assert any title by virtue of the Furman deeds, but treated it as the property of his wife, and abandoned those deeds as of no force, or that his conduct

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showed he considered himself a trustee for his wife, are not only not proved, but are disproved by a mass of documents, facts and witnesses. Those averments being responsive to the bill, make the answer evidence. The acts of Jacob Harsen are from the date of his deeds in 1790, up to his death in 1835.

The answers, and the whole evidence in the cause, show that Mrs. Harsen never pretended to exercise any control or ownership over the property which a wife might not use in respect to her husband's own separate property. And that Mr. Harsen, from the date of the deeds in 1790 to his death in 1835, 45 years, claimed and exercised under those deeds, full, absolute and perfect dominion, over the property. The bill is false in saying she received rents, controlled the lands or acted as their mistress. The testimony proves the contrary.

In addition to the evidence furnished by the defendants, who were required to answer under oath, the following acts of testator show that he acted under the Furman deeds as conveying him the property, and as being operative up to his death. The greater part of which acts Mrs. Harsen must have known. And she never interfered with, but acquiesced in them. He gave publicity to the deeds, by recording them, when not necessary, in August following their execution. He granted, and the lessees took, long leases from Mr. Harsen, in his own name alone, from soon after the execution of the deeds in 1791, up to his death, 45 years. That fact shows his claim and the general knowledge, by the tenants, of his title. It also must have been known to Mrs. Harsen, who never made an objection. The leases were long. Inquiries must have been made. Bargains for the leases must have been made at his house, where she was present. And what tenant is produced to show that she interfered? He received the rents on the property, from the date of those deeds to his death, without dissent of Mrs. Harsen. Of course she must have known it. These tenants, most of them, lived in the immediate neighborhood. Those leases and rents covered all the period of the chancery suit. And then when they say he abandoned his claim, years after the chancery suit commenced, and four years before it terminated

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he received from the corporation a water grant to himself as owner of the adjoining property in fee. This shows his claim in fee; and that the corporation recognized it. Upon the compromising of the chancery suit, he received two releases of the property to himself, in 1809. In 1817, the corporation awarded to him his damages for widening Mott-street, as the owner in fee of the adjoining premises; which damages he received. This again shows his claim in fee, and the recognition of his title by the corporation. He also executed two or three wills, in which he claimed to dispose of the property in fee; and he gave his wife certain parts of his property in lieu of dower in his real estate. Every time he signed a will and prepared to die, he then commenced the fraud, if fraud it was—for not till then did he do any harm by the Furman deeds.

The bill and the decree in the chancery suit were not a recognition or admission by Mr. Harsen that his wife's estate and interest in the property remained unaltered, or that he thereby abandoned the deed of his wife to him, much less do they operate against him as a technical estoppel. The facts set forth in the chancery bill shew not only the propriety, but the absolute necessity that it should have been filed in their joint names. The bill cannot possibly operate as an estoppel. And if it did, it could only operate upon that one-fourth of one-fifth which was immediately deeded over to Cornelius Harsen. An estoppel of record is only between adverse parties, when something has been adjudicated in favor of one against the other. (2 *John. Rep.* 24. 12 *Wend.* 399. 5 *Id.* 245.) Here was no contest between the testator and his wife. The defendants had no interest in the question: they were not prejudiced, the way the bill was drawn. It was no subject matter of controversy to estop any body. How does the bill act as an estoppel? He does not claim title under the bill or decree. An estoppel must be mutual; but here the wife would not be estopped by any thing in the bill. (9 *Paige*, 255.)

If it was clear that the one-fourth of Cornelius' share was covered by the Furman deeds, and was in severalty, and Jacob Harsen had brought ejectment on his deed, how would he have declared. One count on a demise from himself, claiming

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through his deed, and another count on a demise from himself and wife to guard against the objection that the deed did not operate on lands, as to which there was an adverse possession.

A bill in chancery is not only no technical estoppel, but unless sworn to, or signed by the complainant, is no evidence as to any allegations or admissions in it, in any collateral action. (1 *Phillips' Ev.* 358. *Cowen & Hill's Notes*, No. 640, p. 923. 2 *Hall's Rep.* 433. *Peake's Ev.* 54. *Bell v. Thompson*, 1 *A. K. Marsh.* 511.) This bill is neither sworn to, nor signed by Mr. Harsen, nor is there a particle of evidence that he ever laid his eyes upon it, or upon the decree. Knowledge is the essence of estoppel and admission. Again; the decree was abandoned and waived by all parties, and was never acted on. Releases were given, on a compromise made, which do not pretend to carry out the decree, or have any reference to it. A decree can only act on the bill, and make its averments evidence, not new and independent averments. Now there is no averment in the bill inconsistent with the Furman deeds. I again repeat, there is no averment in the bill, that Harsen and wife were seised in right of the wife, as the vice chancellor erroneously supposed. If the testator had obtained the deed by undue means he would have been careful not to commit himself by any averments in the bill, or by holding out the idea that his wife still held the property. But there are no such averments. The testator could not have meant to waive his title, by the chancery suit; for during its pendency he made long leases in his own name; collected the rents in his own right; claimed of the corporation a grant in fee of the water lot in 1804, and he did every act that an owner of lands in his own right, could do. To show that he waived no title by the bill or decree; that he claimed the lands as his own in his own right, and that Mrs. Harsen acquiesced in his claim, and knew that she had conveyed the title to him, the defendants refer to three releases executed on the 9th February, 1809, after the chancery suit was at an end.

The three releases executed on the termination of the chancery suit, are a perfect recognition, by Mrs. Harsen and by all the parties thereto, of the title of the testator. They were exe-

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cuted with great parade, and were witnessed by Riggs and Hildreth. There was no fraud in the execution thereof. Riggs, the drawer of these documents, well knew that the title was in the testator. He was one of the counsel who argued the cause, as appears from the decree; and he well knew the difference between what was Mrs. Harsen's share and those of the other female heirs; for where they and their husbands are mentioned the writing always says the husband and wife are seised in right of the wife. Riggs therefore drew the release to Mr. Harsen, based alone upon his title acquired under the Furman deeds. In the agreement to sell the Fair-street property, Mrs. Harsen is a party signing and acknowledging. It recites the compromise of the suit, and the express recognition of Mrs. H. and all the signers, that one-fourth belongs to Jacob Harsen, one-fourth to Lettice the wife of Peter Hegeman. Then in the agreement for the sale; the deeds were to be given to purchasers, and one-fourth of the proceeds were to belong to Jacob Harsen, one-fourth were to be paid to Hegeman and wife, in her right, and Hopper's and his wife's share, in her right, and of Bertine and wife in her right. So in the release of back rents, of the same date, which release Riggs drew and witnessed. It recites the compromise; that the suit was brought to recover back rents of the Bloomingdale and the Fair-street property, and to settle the personal estate of old Cornelius and the legacies under his will; and all claims which one party might have against the other as administratrix of the personal estate of old Cornelius; and states that the object is to release all such claims. Mrs. Harsen, as administratrix of her father, was properly a party to the deed; and this shows she was properly made a party to the suit. These solemn documents are a perfect answer to the ideas of Mrs. Harsen having the property, or that Mr. Harsen waived his title or only took a trust, or is estopped by the bill. The complainant, to oppose all this, gives evidence of Mrs. Harsen's loose declarations that the property was hers. Such declarations were not admissible as evidence. Declarations are to be received with great caution. Some of these were made some forty years ago, and some in her last sickness, when

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she was disposing only of the \$3000 left her by her husband's will. Those declarations, by the smallest change of words, are reconcileable with the idea that the property was once hers by inheritance.

George Wood, for the appellants, in reply. I propose to confine myself to two propositions, and to present them in the alternative. The deed from Catharine Harsen to her husband, was unreasonable and unconscientious, and obtained by undue influence and imposition, or it was obtained for the mere purpose of giving him the legal title, to enable him to manage the property for her, and upon her behalf to execute leases and conveyances, for her benefit, but, subject to his marital interests during his life. If the latter was bona fide the object, and it was faithfully carried out, there was no fraud of any kind; but to prevent fraud, it must be carried out, or it becomes an engine of fraud, which equity will prevent. If it was merely an ostensible motive, then it stamps the whole transaction with fraud.

Assuming that Jacob Harsen designed to get from his wife a conveyance of her property, so as to vest himself with an absolute estate for his own account and benefit, it ought to be set aside, as fraudulent, in equity. It is not pretended that he *purchased* this property from his wife, or that there was any consideration for the conveyance, beyond the nominal consideration, technically necessary to give effect to the conveyance. To operate then in equity, it must take effect as a gift. The right of the wife, at common law, to her real estate, except so far as respects the qualified right of the husband, is just as strong and effectual as is her right in equity to property settled upon her in strict settlement. It was so held in *Gahn v. Niemcewicz*, (11 *Wend.* 316.) A wife may give property to her husband, as well as to any other person; though the old common law rule was otherwise. (See *Roper on Husband and Wife*, 53.) But the reasonableness of such gifts must depend on circumstances. If he is prudent and a portion of her estate is wanted for the maintenance of the family, it may be proper to give him a portion. If she has all the estate, and he has none, and she wants

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to give him consideration, the gift may be proper. In this case, she gives him all, without any reserve—he bringing no estate with him into the family. If he should become unfortunate or should squander the property, she is left without support. Such a gift is most unreasonable; and the acceptance of it most unconscientious. It is impossible to conjecture, with the vice chancellor, that it proceeded from a proper sense of generosity on her part, and was accepted with a due sense of justice on his. We would rather say with Lord Hardwick, it is a transaction which no prudent person would enter into and no honest one require. (*Chesterfield v. Jansen*, 2 Ves. sen. 155.) Not only is no settlement made upon her, but not even a dollar of pin-money is reserved for her. Her husband's share is the lion's share. Such conduct is at war with proceedings usually had in equity in such cases. A court of equity requires a reasonable settlement to be made by the husband upon the wife, before it lends its aid to enable him to recover her property, which he is by law entitled to recover. The New-York rule goes farther. It will compel a husband to make a reasonable settlement; even when the aid of equity is not required. Sound practical morality calls upon a court to pronounce such a transaction unreasonable and unconscientious.

Again; the affair appears to have been shrouded in secrecy. None of Mrs. Harsen's relations were called in to advise with her upon the subject. Not one is brought forward to testify to it. These conveyances though recorded, were not known. The neighbors appear to have considered the property to be hers. Persons having the confidence of others and standing in a relation to them of commanding superiority, are bound to advise them, as though they were acting with others. (*Gibson v. Joyce*, 6 Ves. 271.) If she had been making a gift to a child or collateral relative, or to a person in distress, he would have felt it his duty to advise her. The gift being to himself he ought to have required her to take advice from some friend. The vice chancellor seems to have been aware of this; and therefore he introduces Judge Furman and his lady upon the stage as participating in the transaction, and he conjectures that all four

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of them must have come together and consulted about it. But the judge has entirely forgotten it. Now the evidence, if we are to take evidence instead of conjecture, is directly the other way. It is almost impossible to suppose that the judge could have forgotten such a scene as the imagination of the vice chancellor has pictured. But if called in simply to perform the naked ceremonial of receiving and executing a deed at the instance of a neighbor, nothing is more natural than that the event should have passed out of his mind. In these unconscientious bargains, if there be the least scintilla of fraud, a court will set them aside. (3 Cowen, 538.)

It is impossible to account for the proceedings in partition, on the supposition that Jacob Harsen was the real owner of this property, and that it was fairly obtained. He had lately procured it. He must have considered it important to himself to procure it. The counsel employed, was the late Mr. Harrison. If Harsen had produced these Furman deeds, they would never have been left out of that partition suit. Besides, the bill involved other claims. An accounting was to be had. Why then did he not produce those deeds to his solicitor and counsel? Did he forget them? That must have been impossible. Was he afraid if a serious controversy arose, her relations might have inquired into the matter; might have apprized his wife of the situation of the title, and awakened her to her true situation? That is much the most probable. After the whole affair is compromised, and the mere title deeds are to be executed, he instructs the new counsel he employs, to have the deeds executed to himself. All this would be done in a corner in the scrivener's office. No suspicion would then be awakened.

Again; the subsequent conduct and deportment of both husband and wife is incompatible with the idea that he had become the true *bona fide* owner of all this property. She, in his presence, treats it and deals with it as her own, and he does not object. The vice chancellor gets over this by saying that it was natural she should call it hers. But this will not answer. It is in important matters of business in relation to it and of disposal, that she, with his sanction, treats it and

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deals and it as her own. There is some little contradiction in the testimony, but the weight of the evidence leads conclusively to this result. What is there to oppose to these views and considerations? He does not show that any relative, friend, or even acquaintance of hers was called in to advise with her in making this most unreasonable gift. The burden of showing this, was on their side. (6 *Ves. jun.* 278.) It is said she passed through the ceremonial of an acknowledgment, apart from her husband. True, these ceremonials are designed as safeguards, but it is held that they are very ineffectual safeguards. Their absence is defective—but where they exist very little weight is attached to them. Every practitioner at the bar has met with various instances of fortune-hunting husbands acquiring the property of their wives. And these ceremonials are always most religiously observed. But little importance has heretofore been attached to them by the vice chancellor himself. (See *Ferris v. Brush*, 1 *Edw. Ch. Rep.* 573.) In that case he was not satisfied with going through the ceremonial, like an ordinary magistrate—but required that she should attend at his chambers and be subject to a most rigid scrutiny. In the celebrated case of *Huguenin v. Baseley*, (14 *Ves.* 273,) all the ceremonials were duly complied with. So in *Whelan v. Whelan*, (3 *Cowen*, 572,) and in *Griffiths v. Robbins*, (3 *Mad. Rep.* 105.)

It is further said, that the character of old Jacob Harsen was so good, that it ought to overcome this charge. If we look at the whole evidence, his character would rather favor the idea that he had unduly procured these deeds. But we have nothing to do with character in this case. It is not in issue. (*Fowler v. Aetna Ins. Company*, 6 *Cowen*, 673.) In the case of *Huguenin v. Baseley*, (14 *Ves.* 273,) the clergyman had borne a good character, but the chancellor did not on that account shut his eyes to the true character of the transaction.

It cannot be pretended that lapse of time has barred this claim. The general rule unquestionably is, that courts will not favor stale transactions. And even where there is no positive bar, presumptions will be raised in favor of long continued

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enjoyment by one party, and acquiescence by the other. But there are many exceptions to this rule. It ought not to apply to a case where the imposition originally practised, whatever it was, has continued down to the commencement of the suit, or nearly so, and where the party, especially in the case of a married woman, has been all the time subjected to the control of the other. When we look at the features of this transaction, and the subsequent conduct of the parties, we are at no loss to discover the character of the imposition practised. She was led to believe that the paper she executed was necessary and proper to enable him to manage the estate. The evidence shows she was ignorant and illiterate, grossly so, considering the station in which she was born. It would have been an easy matter, for a grasping and fortune-hunting husband, to impress her mind with that opinion, without giving her any very definite idea of the character of the instrument she was executing. It is probable the subject afterwards passed out of her mind ; for she never appears to have adverted to it, but she spoke of and treated the property as her own, and her husband encouraged her in that opinion. Now, the doctrine is too well settled to require the citation of authorities in this court, that while the delusion lasts, and until the veil of deception is removed from the eyes of the party deceived, lapse of time does not at all prejudice the remedy.

I now come to my second view of the case, which is, that Harsen obtained the conveyance in good faith ; merely with a view to enable him the better to manage the property, and without intending to strip his wife of the beneficial ownership of the property. This aspect will best harmonize with the general current of the testimony, with the partition bill recognizing her title, and the subsequent conveyances to himself, and with her subsequent actions and directions respecting the property, with his concurrence. At the close of his life, when he was brought under an influence which led to his partial disposition of the property by will, we may readily account for his being induced to dispose of it as his own, without much imputation upon his character. The weakness of old age is subjected to influences

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which call for the exercise of a charity in reference to moral imputation, which ought never to be indulged in for the sake of protecting the unjust gains of the grasping and avaricious, against the claims of suffering innocence. Now, if the husband obtained this property from his wife under such an understanding, a court of equity will charge it with a trust, in favor of her and her representatives, and compel its execution; because to violate the engagement would be to perpetrate a fraud. It is like the case of an heir promising the ancestor, if the estate is left to descend to him, he will give certain legacies to younger children. Equity will hold him to his engagements.

THE CHANCELLOR. There is nothing in this case from which any court could be authorized to infer that the deed of May, 1790, from Jacob Harsen and his wife to Gabriel Furman, was obtained by the husband by any fraud or undue means; or by taking an unconscientious advantage of her situation, and of the confidence which she reposed in him. It was not the case of a fortune-hunter marrying an heiress, and then taking advantage of her confidence in him, even during the honey-moon, to defraud her of her property. Although the property embraced in that deed has now become of very great value, it was worth, comparatively, but little at the time the deed was given, about sixty years since. At the time the parties were married, they were nearly on an equality as to property. For the wife then had nothing but an expectancy in one-third of her deceased father's estate, after the death of her mother. And it appears from the statement in the old bill in chancery, that the estate of her deceased father was so embarrassed as to be unable to pay the £100, for which Swanston had become his security, and for which a judgment was recovered against the widow and executrix in 1774. This was the same debt which Jacob Harsen was compelled to pay, on account of the estate of his father-in-law, with the accumulated interest and costs, about twelve years afterwards. The death of her sister, however, in 1788, left Mrs. Harsen the sole owner of that part of the property of her deceased father to which the title was not

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contested, by the widow and children of her deceased uncle Balaam Johnson. And it was not an uncommon thing, even in those days, where property was thus situated, for the wife to vest the legal title in the husband, by means of a conveyance by the husband and wife to a third person, and a reconveyance by the latter to the husband. These parties had been sixteen years married, at the time of the conveyance of 1790. And the fact that the deeds were put upon record, in the city of New-York, a few months after they were executed, although there was then no law requiring deeds to be recorded, rebuts all presumptions that any fraud or concealment was intended, on the part of the husband. Nor is it true, as alleged in the bill in this case, that it was not generally known that the title to the property was in the husband; or that the wife was ignorant of that fact. Several leases of portions of the property, for terms of twenty-one years, executed by Jacob Harsen alone, were produced in evidence; which mode of leasing is inconsistent with the idea that the lessees supposed the legal title to be in the wife. And leases continued to be executed in that manner, by the husband alone, without being also executed by his wife, down to the time of his death. And in the latter part of his life when the infirmities of age compelled him to do business at home, many of those leases must have been executed at his residence, when his wife was present. Indeed the complainant herself is the subscribing witness to several of those leases, executed by her grandfather in the years 1823, 1824 and 1825, while she was living with him, and before her marriage. The answers of some of the defendants, responsive to the bill in this respect, as well as the testimony of witnesses on the part of the respondents, show that Mrs. Harsen was aware that the legal title to the property was in her husband. The testimony of the late General Bogardus renders it almost certain that she was consulted in relation to a will drawn for her husband nearly thirty years before her death, in which the husband made ample provision for her out of property which the complainant now insists Mrs. Harsen then believed to be her own already. There is very little doubt also, that she must have been consulted by

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her husband in relation to his last will, in which he appears to have been so solicitous to provide every thing requisite for her comfort and gratification, in case she should survive him. I have no doubt, therefore, that Mrs. Harsen was perfectly aware what she was doing when she joined with her husband in the deed to Furman; for the purpose of having the legal title vested in her husband by a reconveyance to him.

The technical common law rule, that a feme covert cannot make a conveyance to her husband, does not apply to such a conveyance made through the medium of a third person. (*Jackson v. Stevens*, 16 *John. Rep.* 110.) In that way she may exercise the same control over her real estate, for his benefit, as she could if it was held by a trustee, with a power on her part to appoint it to whom she pleased. And all that this court allows itself to do in such cases, is to see that the wife has not been imposed upon by the husband's taking an unconscientious advantage of her situation. (*Pybert v. Smith*, 1 *Ves. jun. Rep.* 189. *Parkes v. White*, 11 *Idem*, 222. *Bradish v. Gibbs*, 3 *John. Ch. Rep.* 523.)

The actual payment of the nominal consideration, expressed in the deed, is not necessary. It is sufficient if it is stated in the deed as the consideration thereof. And as between the parties, where a mere nominal consideration is inserted in a conveyance for the purpose of supporting it, the court ought not to allow proof to be given of the non-payment of such nominal consideration, in order to destroy the deed. (*The Bank of the United States v. Houseman*, 6 *Paige's Rep.* 526. *Shep. Touch.* 222.)

The next question to be considered is, whether the acknowledgment of the deed was sufficient, as the law then stood, to render it valid as a conveyance by a feme covert. In examining this question, it must be recollected that the rule of the English common law, which disabled a feme covert from conveying her real estate in any other manner than by a fine, or a common recovery, was never in force in this state, either when it was a colony or since. At the least, no such law has been in existence in this state since the colonial act of the 6th of May

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1691, was rejected by the crown, in 1697. (3 *R. S.* 1st ed. App. 3.) The act of the 16th of February, 1771, to confirm certain ancient conveyances, and directing the manner of proving deeds to be recorded, (2 *Van Schaack's Laws of N. Y.*, 611,) and all the subsequent statutes on the subject, are merely restrictive of the right which a feme covert possessed, by the common or customary law of the colony, to convey her estate by deed, with the concurrence of her husband. These restrictive statutes, which have been revised and re-enacted from time to time, are substantially in the same words in reference to the acknowledgment of the wife. The practice of the acknowledging and recording officers, and the decisions of the courts, under any of those statutes, may therefore properly be referred to for the purpose of ascertaining the practical construction which has been given to the law on this subject.

The act of 1788, (2 *Greenl. Laws*, 99,) required an acknowledgment, by the feme covert, on a private examination, apart from her husband, that she executed the deed *freely without any fear or compulsion of her husband*. And the acknowledging officer was required to endorse on the deed a certificate of such acknowledgment, "purporting that she had been privately examined, and confessed that she executed the same freely, without any fear or compulsion of her husband." And these last words are copied from the second section of the act of the 16th of February, 1771, on the same subject. If a literal compliance with the words of these statutes, as to the form of the certificate of the acknowledgment by the wife, should be decided to be necessary a very great proportion of the deeds executed by married women, since the act of 1771, would be found to be invalid. It has, therefore, very properly been held, not only here but in our sister states, that a substantial compliance with the requirements of the statutes, relative to the proof or acknowledgment of deeds, was all that was necessary; and that it is not necessary that the certificate of the acknowledgment should be in the precise words used in the statute. (*Jackson v. Gumaer*, 9 *Cow. Rep.* 552. *Langhorne v. Hobson*, 4 *Leig's Rep.* 224. *Tod v. Baylor*, *Idem*, 498

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McConnel v. Reed, 2 *Scam. Rep.* 371. *Sharpe v. Hamilton*, 7 *Halst. Rep.* 109. *Brown v. Farran*, 3 *Ham. Ohio Rep.* 151. *Skinner v. Fletcher*, 1 *Ired. Law Rep.* 313. *Hollingsworth v. McDonald*, 2 *Harr. & John. Rep.* 230.)

The word *freely* is not found in the certificate of the acknowledgment of the wife in the present case. And the question is, whether the words used in the certificate do not mean the same thing substantially; so that the certificate does in fact purport, or intend to show, that the wife executed the deed freely, or voluntarily. The object of the private examination of the wife, apart from her husband, is to ascertain whether the execution of the deed was her spontaneous act; or whether she was induced to execute it by coercion, or fear of ill usage, or other injury from her husband. It is not necessary that the wife should act without a motive, in the execution of the deed, or execute it as a mere act of generosity, without any hope of present or future benefit resulting from it. Nor is the word *freely*, in the statute, intended to be used in any such sense; but it there means, without constraint, coercion, or fear of injury from the husband, under whose power and control she is legally supposed to be. I think, therefore, that when Master Ray certified that he examined Mrs. Harsen privately and apart from her husband, as to her execution of the deed in question, and that she acknowledged she executed it without any fear, threat, or compulsion of her husband, his certificate was a substantial compliance with the statute. But even if this would have been a doubtful question originally, the maxim that *custom is the best interpreter of the law*, (4 *Inst.* 75,) is applicable to this case. In deciding upon the statute relative to jointures, in the case of the *Earl of Buckinghamshire v. Drury*, (2 *Eden's Rep.* 74,) Lord Mansfield acted upon that principle. He says, "consider also the usages and transactions of mankind upon it; the object of all laws with regard to real property is quiet and repose. As to practice, there has almost been only one opinion. The greatest conveyancers, the whole profession of the law," &c. Several of the courts in this country have also applied this legal maxim to the construction of statutes relative

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to the proof and acknowledgment of deeds. (See *McKeen v. DeLancey's Lessee*, 5 *Cranch*, 32; *McFerran v. Powers*, 1 *Serg. & Rawle*, 106; and *Jackson v. Gumaer*, 2 *Cowen*, 567.)

One of my learned predecessors in this court, in reference to the construction of our statutes, relative to the form of the certificate of acknowledgment, says: "From the enactment of this provision concerning the acknowledgment of deeds, in 1797, until this time, certificates of acknowledgment have been made in different forms, and have been expressed in various terms. The most usual form has, I believe, been that which adopts the language of the statute. But various other forms have been used, and certificates, expressed in the language used in this instance, have certainly been very usual in all parts of the state. Certificates like this have been considered and treated as sufficient during twenty-seven years; and a decision that they are not valid would subvert titles to lands to a very serious extent. They have been held sufficient not merely by recording officers, but by judicial officers who have taken acknowledgments, and have composed their certificates in this form; by judges of the supreme court, judges of the county courts, masters of this court, and commissioners. This general usage, thus long continued and hitherto unquestioned, has great force; and the practical construction of the law by so many public officers, though not given upon adverse litigation, must still have much of the weight of judicial decision. The construction which considers these certificates as a substantial compliance with the law is liberal, but not violent or unreasonable. This construction has prevailed so extensively, and for so long a period, that it possesses high authority, and to pronounce these certificates void would be a most dangerous innovation. I shall, therefore, in pursuance of the received interpretation of the law, consider the certificate upon which the mortgage to Troup was registered sufficient, and the mortgage duly registered." (*Troup v. Haight*, *Hopk. Chan. Rep.* 267.)

Nearly every word of this part of the opinion of the late Chancellor Sanford, in *Troup v. Haight*, is directly applicable to the present case; except that it can hardly be said

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hat the certificates of acknowledgments have been the most usual, by *femes covert*, in which the language of the statute has been adopted. For of the 660 acknowledgments, embraced in the respondent's exhibit No. 34, I believe there is not one in which the language of the statute is adopted throughout; though in most of them equivalent words are used. And a similar departure, from the precise language of the statute, will be found in most of the certificates produced on the other side. The only operative part of the certificate, in relation to the acknowledgment of a *feme covert*, is that which states what she acknowledged upon her private examination apart from her husband. For what she acknowledges or admits in his presence is no part of the acknowledgment of the deed, as to her. It will be seen, therefore, by the respondent's exhibit No. 35, that there are in the records of the city of New-York alone, 261 conveyances, by *femes covert* and their husbands, in which the acknowledgment, as to the wife, is in the same form as in the deed of 1790 from Jacob Harsen and wife to G. Furman. I also find, upon examination of the numerous certificates produced by the appellant herself, that in a great portion of them the language is the same, so far as relates to the private acknowledgment of the wife, as it is in the certificate endorsed upon this deed, and in the certificates embraced in exhibit No. 35, on the part of the respondents. For instance; in four out of the nine certificates, from books 67, 68 and 70, of deeds in the city of New-York, at the commencement of the appellant's exhibit H. No. 1, the certificate as to the acknowledgment of the *feme covert* is in this form: "And the said J. being examined by me privately and apart from her husband, acknowledged she executed the same without any fear, threat, or compulsion of her said husband;" without any other words to indicate that she acknowledged, on her private examination, that she executed the deed freely or voluntarily. And among the certificates produced by the respondents, and which are substantially in the same form, there are eight which were drawn by justices of the supreme court, five by Samuel Jones as recorder of the city of New-York, eleven by James Kent as a master in chancery

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and about 230 by J. M. Hughes, John Ray and Jeremiah Lansing, also masters in chancery. Numerous titles, of course, depend upon this practical construction, which has been given to the statutes on this subject, by high judicial officers, and others, for the last sixty years. And, in the language of Chief Justice Tilghman, it would be unpardonable to disturb it now, by a critical examination of the words of the statutes. The vice chancellor, as well as the superior court, was therefore right in supposing that the deed of the 28th of May, 1790, was properly executed and acknowledged, so as to pass the legal title to the lands mentioned therein, to Gabriel Furman, the grantee in such deed; except one undivided fourth of the lands at Bloomingdale, which were specifically devised to Cornelius Cozine the younger, by the will of his father. And by the reconveyance, from Furman to Jacob Harsen, the latter became entitled to an estate in fee simple, in his own right, in all the lands to which Furman obtained the legal title under the deed from Jacob Harsen and wife to him.

. If the will of Cornelius Cozine, the elder, is correctly stated in the bill in chancery, filed in 1794, and if the times of the respective deaths of Garret Cozine and of his brother Cornelius Cozine, the younger, are truly stated, it is at least doubtful whether Mrs. Harsen was ever entitled to any part of the real estate devised to her uncle Cornelius under the will of her grandfather. For the limitation over, upon the death of any of the devisees without issue, was not to all the other children of the testator; but it was to those of his children who should then be living. Indeed the person who drew the deed of 1790 was probably aware that the right of Mrs. Harsen to one-fourth of the real estate devised to her uncle Cornelius was questionable. For in the recitals in that deed it is not stated that Garret Cozine, or his children, became entitled, under the will of his father, to one *fourth* part of the real estate devised to his brother Cornelius. But the recital in the deed is, that Garret Cozine, under the will of his father, became entitled to *one undivided part* of the Bloomingdale farm and of the Fair-street lots; without stating what the extent of that undivided part was, under the will. The bill

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in chancery, of 1794, also appears to have been drawn with the same care, in not stating the interest of Garret Cozine, or of Mrs. Harsen, in the one-fifth of the farm, and of the Fair-street lots devised to Cornelius Cozine the younger; though it is stated in that bill that the complainants applied to the widow and children of Balaam Johnson Cozine, and requested them to divide the property into four equal parts. The person who drew the bill appears to have been equally careful not to state what the present rights of Mrs. Harsen were, in any of the property which had come to her from her father and her brother and sister. Chancellor Lansing, in making his interlocutory decree in that suit, seems to have overlooked the fact that it appeared from the dates, stated in different parts of the bill, that Garret Cozine died about two years before his brother Cornelius. And if this fact was overlooked by the counsel for the defendants, upon the argument of that case, it might well have escaped the vigilance of the court. For I see that in one part of the bill the complainants charge and insist, that if Cornelius Cozine the younger did make a will, as pretended by the defendants, he had no right to devise the real estate which came to him by the will of his father; but that upon his death without issue, the same went to his surviving brothers and sisters, under the provisions of the will of Cornelius Cozine the elder. And in this part of the bill of 1794, Garret Cozine is actually named, as one of those survivors.

There were good reasons for saying nothing, in the bill of 1794, in relation to the deeds of May, 1790, and of the alteration of the rights of Jacob Harsen and his wife in consequence thereof. For as between themselves, they probably considered it as a matter of but little consequence, whether the legal title to their share of the Fair-street lots, and the other lands in dispute in that case, was declared to be in the one or the other. Besides, it appeared by that bill that the twenty acre lot of Cornelius Cozine the younger, at Bloomingdale, was held adversely by the widow and heirs of Balaam Johnson Cozine, in May 1790. The legal title to that lot, therefore, remained in Mrs. Harsen, notwithstanding the deed to Furman and the recon-

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veyance to her husband. Both Harsen and wife, then, were necessary parties to that bill, for nearly all of the purposes for which it was filed. And it would have been perfectly useless to say any thing in that bill about the deeds of 1790 ; or for the defendants in that suit to refer to them in their answers, or in their proofs, even if they knew that such deeds had been executed. The bill not being sworn to, it was no evidence of any fact, as between Harsen and his wife. And the interlocutory decree of the chancellor, as a matter of course, was made in accordance with what he supposed the rights of Harsen and his wife to be, from the statement of the original title of Mrs. Harsen, in the bill.

That decree, so far as it settled the rights of the complainants and defendants in the Fair-street lots, and in the twenty acre lot at Bloomingdale, which was specifically devised to Cornelius Cozine the younger by the will of his father, and of which a partition was directed, might perhaps be considered as settling the rights of all parties as to those particular lands, if the decree should not be appealed from. But as between Harsen and his wife, and as between their heirs, there is nothing in that decree which could operate by way of estoppel to prevent them from showing the true state of the title ; even as to the twenty acre lot which was specifically devised to Garret Cozine by the will of his father. Much less could any thing in that decree operate as an estoppel in reference to the forty-seven acre lot at Bloomingdale and the Mott-street lots, which Garret Cozine had acquired by purchase in his lifetime ; and which were not mentioned, or even alluded to, in such decree, or in the bill on which it was founded.

Harsen never claimed title to the twenty acre lot, at Bloomingdale, under that decree. But he claimed title to it under the deed of May, 1790 ; which title was confirmed to him by the release and quit-claim deed that was obtained, from the heirs of Balaam Johnson Cozine and of his two sisters, under the compromise in February, 1809. The part of the twenty acre lot originally devised to Cornelius Cozine the younger, which was also embraced in that quit-claim deed, was conveyed by Jacob Harsen and his wife to their son Cornelius, by a deed of gift, a few days

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after that compromise was completed. And all the Fair-street lots must have been sold, and the proceeds divided, very soon thereafter. No part then of the property which the decree directed to be partitioned, or which could have been partitioned in that suit, belonged either to Jacob Harsen or his wife at the time of their respective deaths. The title of Jacob Harsen to the property in dispute in the present case, under the deeds of May, 1790, was therefore in no way impaired by any thing contained in the bill of 1794, or by any thing stated or declared in the interlocutory decree made in that suit.

The validity of the will of Jacob Harsen was not only established before the surrogate, but also upon the trial of the ejectment suit, in the superior court in New-York. And it is only necessary to say, that there is nothing in the testimony in the present case, to induce me to doubt that the testator was perfectly competent to make a will, or that his will was duly executed. The appellant's unnatural and abusive treatment of her aged grandfather, who had stood in the place of a parent to her, from infancy to womanhood, and who again furnished her a comfortable home when she was separated from her husband, is sufficient to account for the provisions of his will as to her; without the necessity of supposing that his intellect had become impaired so far as to render him incompetent to make a valid will. And the state of the sister's mind made the provisions of the will discreet and proper as to her. For these reasons, even if this court had jurisdiction of a suit to set aside a will of real estate, the bill in this case was rightfully dismissed; upon the ground that the complainant had wholly failed to sustain the allegations, in her bill, in relation to the validity of the will under which the respondents claimed title to the property in controversy.

The claim of the complainant to a part of the premises conveyed to Jacob Harsen, as a water grant, in October, 1804, and to a part of the moneys received by him, from the corporation of New-York, for the damages sustained by the widening of Mott-street, necessarily falls with the failure of the other claims upon the estate of the testator. It is unnecessary, therefore, to

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inquire what would have been her equitable rights in respect to the water lot, or to the money received by her grandfather for damages, if she had succeeded in showing herself entitled to one-fourth of the real estate in controversy, as one of the heirs at law of her deceased grandmother.

The decree of the vice chancellor must be affirmed, with costs to be paid to the several respondents or their solicitors, or guardians ad litem ; except as to the defendants Fay and wife. And if the executors of the will of Jacob Harsen are not able to collect their costs from the appellant, they are to be at liberty to retain the same out of the personal estate of the testator which has come to their hands as such executors.

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The court of chancery, in this state, has jurisdiction, and will entertain a bill of discovery in aid of the prosecution of a civil suit, in a sister state, or in a foreign tribunal, or in a court of the United States.

But it will not entertain such a bill when filed against a person who is not a party to the suit in which the discovery sought for is to be used ; even though such person is the substantial party in interest in the defence of that suit.

If the court of chancery has the power, it must be a very special case which will induce it to break over the rule, of comity and policy, which forbids the granting of an injunction to stay the proceedings in a suit commenced in a court of competent jurisdiction in a sister state.

Upon a bill of discovery in aid of the prosecution of a suit at law, an *ex parte* injunction ought not to be granted, where no fact is positively sworn to, as being within the knowledge of the defendant, which, if proved, would defeat the defence in the suit at law, and enable the plaintiff to recover in such suit.

THIS was an appeal, by the defendant, from an order of the late vice chancellor of the first circuit, denying an application to dissolve an injunction. The bill upon which the injunction was granted, was a bill of discovery merely ; in aid of the prosecution of a replevin suit, instituted by the complainants against Allen, in the court of common pleas for Suffolk county in Massachusetts. It appeared, from the bill, that the goods for which

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the replevin suit was brought were obtained from the complainants by false pretences, and a conspiracy to defraud them out of the value of such goods. The bill stated that the conspirators, who obtained the goods of the complainants, shipped them at Boston on board a schooner, of which Allen was the master, and who signed bills of lading therefor, to deliver the goods in New-York. Allen set up, as a defence in the replevin suit, that the bills of lading were transferred by the conspirators to the defendant, who was a merchant in New-York, either as security for an antecedent debt, or for their draft on him, which he accepted on the faith of the said bills of lading. And the object of the bill was to obtain a discovery, from the defendant in this suit, as to what was the true consideration of the assignment of these bills of lading, and whether the defendant did not know, at the time he received the same, that the conspirators Eastman, Fendrey & Co. were in the habit of obtaining goods by fraud, to be sent on to him for sale. It also appeared, by the bill, that a commission had been issued, to a commissioner in the city of New-York, to examine the defendant Smith as a witness, in the replevin suit depending in the court of common pleas in Massachusetts. But he refused to give evidence, upon the ground, as he stated on his oath, that he was the substantial party in interest, as the real defendant in that suit, and that he had employed counsel to defend the same.

Upon the filing of this bill, an injunction was granted, restraining the defendant Smith from taking any proceeding in the replevin suit which the complainants had instituted against Allen, or bringing such suit to trial, until he should have made the discovery called for by this bill; and from aiding or assisting Allen to do so. And the late vice chancellor, on an application upon the bill alone, refused to dissolve the injunction; and made the order appealed from.

John E. Develin, for appellants. The court of chancery will sustain a bill of discovery, to aid the prosecution or defence of a civil suit in a foreign tribunal; but if a stay of proceedings is wanted, application must be made to the court in which the

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action is pending. (*Mitchell v. Smith*, 1 *Paige's Rep.* 287. *Mead v. Merritt and Peck*, 2 *Idem*, 402.) The complainant in a bill of discovery, who prays an injunction to stay proceedings at law until discovery made, must not only show that the facts of which he seeks discovery are material to the prosecution of his suit, but there must be an averment of the necessity of such discovery. (*March v. Davison*, 2 *Paige's Rep.* 580.)

S. D. Van Schaack, for respondent. The bill in this cause shows a premeditated plan, on the part of the defendant and of Eastman, Fendrey & Co. to swindle the complainants. The complainants prosecuted Allen, the master of the vessel, in replevin; Smith, the defendant in the present suit, residing in New-York. A commission is issued, and Smith is summoned to testify; but sets up that he is the actual party in interest in the defence of the suit in Massachusetts; and on that ground he is discharged by the judge, as not being obliged to testify. The complainants then file their bill of discovery against Smith in this court, with the necessary allegations, and obtain an injunction restraining him from proceeding with or bringing the replevin suit to trial, and from aiding or assisting Allen, in proceeding with or bringing the cause to trial. The defendant moves to dissolve the injunction, and cites *Mitchell v. Smith*, (1 *Paige's Rep.* 287,) as decisive to sustain his motion.

Before examining the question, I would cite *Mead v. Merritt*, (2 *Paige's Rep.* 402,) and *Bicknell v. Field*, (8 *Idem*, 440,) as cases on which the defendant doubtless would have relied, had the authorities occurred to him. The case of *Mitchell v. Smith*, decides nothing. It merely draws a distinction between asking for a discovery and for an injunction. The other cases are more definite. I understand *Mead v. Merritt* merely to decide, that the court of chancery will not interfere to restrain a suit or proceeding previously commenced in a court in another state, where it may be deemed to be an interference with the proceedings of such court; but nothing more. And *Bicknell v. Field* simply decides, that where a judgment is alleged

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to have been fraudulently obtained, in a court in another state, our court of chancery will not interfere, but will send the parties to the court in which judgment was entered, to have it set aside. The correctness of these decisions I do not question. They are founded on a proper regard to comity and public policy. But these decisions refer simply to the relation which this court should hold with a court of a sister state, and not to the power of our court over any person within its jurisdiction. For in *Mitchell v. Bunch*, (2 *Paige's Rep.* 606,) this court decided that when the person of the defendant is within its jurisdiction, the court has jurisdiction over his property situated out of its jurisdiction, and can compel him to bring it within such jurisdiction. See also 2 *Story's Equity*, § 899, where the learned commentator, after acknowledging the general principle that the courts of one country cannot exercise any control over the courts of another country, and after citing Chancellor Walworth's decision in *Mead v. Merritt*, as in no wise differing from the commentator's opinion, says: "When the parties to a suit in a foreign country are resident within the territorial limits of another country, the courts in the latter may act *in personam* upon these parties, and direct them, by injunction, to proceed no farther in such suit." This is to the point; and conclusive in this case. We do not even ask a party on the record to be restrained. But we seek to restrain the party in interest, being within the jurisdiction of this court, and against whom we have filed a bill for discovery. We do not interfere with a court in a sister state. We will take care of the defendant on the record in the forum where we have prosecuted him. And we ask this court, here, to restrain the defendant in this chancery suit, from aiding the defendant in the replevin suit in his defence. There can be nothing in this contrary to the decisions in the cases cited.

THE CHANCELLOR. This court has jurisdiction, and will entertain a bill of discovery in aid of the prosecution of a civil suit, in a sister state, or in a foreign tribunal, or in a court of the United States. And if this was such a case, the bill would

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not be bad upon demurrer ; although the court might not consider it proper to restrain the defendant from proceeding to trial, in the suit in Massachusetts, in the meantime. But I do not see how any discovery, which may be made by the defendant in this suit, can aid the complainants in the prosecution of the replevin suit, against Allen, in Massachusetts, to which suit the defendant Smith is not a party. It is true, he swore that he was the substantial party in interest, and had employed the attorney and counsel to defend the replevin suit. But Allen is not only defendant on the record, but the judgment, for damages and costs, must be against him personally, if the plaintiffs in that suit should succeed therein. He will, therefore, have the right, upon the trial of that cause, to object that the answer in this suit, to which he is not a party, is not legal evidence against him, to charge him personally with damages and costs in the replevin suit.

Again ; if this court has the power, it must be a very special case which will induce it to break over the rule of comity, and of policy, which forbids the granting of an injunction to stay the proceedings in a suit, which has already been commenced, in a court of competent jurisdiction in a sister state. (*See Mead v. Merritt & Peck*, 2 *Paige's Rep.* 402.) The bill also is defective as an injunction bill, because it is a mere fishing bill. For no fact is positively sworn to as being within the knowledge of the defendant, which, if proved, would defeat the defence of Allen in the replevin suit. (*See Williams v. Harden*, 1 *Barb. Ch. Rep.* 298.) An ex parte injunction, therefore, should not have been granted, upon such a bill.

For these reasons the order appealed from is erroneous, and must be reversed. And the injunction must be dissolved with costs.

WILLIAMSON and wife *vs.* FIELD and others.

Where a decree declared that the complainants in the suit were entitled to certain premises, and to the rents and profits thereof, after satisfying certain mortgages thereon; and ordered a reference to a master to take an account of such rents and profits; and directed that upon the coming in and confirmation of the master's report, certain of the defendants, within six months thereafter, should pay the balance reported against them, with interest, and that the defendants should convey the premises to the complainants, under the direction of the master, and surrender the possession to them; and nothing was said in the decree as to the costs of the suit, but it reserved all further and consequential directions not inconsistent with that decree, with liberty to either party to bring the cause to hearing, for further directions, on the coming in of the master's report; *Held* that so far as related to the payment of the balance which should be found due by the master, and so far as related to the transfer of the legal title of the premises to the complainants, and the surrender of the possession, the decree was, in fact, final. But that inasmuch as the question of costs was not disposed of, and the right was reserved to the parties to set the cause down for a hearing for further directions, &c., it was an interlocutory decree merely.

Held also, that the parties appealing from such decree were not entitled to have the proceedings thereon stayed, without giving security, to protect the rights of the complainants as established by the decree.

Held further, that the fact that some of the appellants were executors and trustees, and that others were infants, formed no sufficient ground for taking the case out of the general rule; though it might induce the court to change the form of the security, if it could be done without injury to the rights of the respondents.

The legal presumption, upon an appeal, until the contrary is shown, is that the decree appealed from is right. And a certificate of probable cause for appealing, given for the purpose of staying the proceedings upon an appeal, has no other effect than to show that the judge who gives the same thinks it possible that his decision and decree may be wrong; not that it is probably wrong.

Where parties appealing to the chancellor, from a decree of a vice chancellor, have money in their hands which they have received for rents and profits of premises decreed to belong to the respondents, the fact that the appellants claim to withhold the money in a fiduciary character will not excuse them from giving security, upon the appeal, to pay such money, together with interest, by way of damages, in case the decree shall be affirmed.

THIS was an application, by the defendants, to stay the proceedings upon a decree of the late assistant vice chancellor of the first circuit, until the decision of the chancellor upon their appeal from such decree. The bill was filed against the executors and trustees, and the heirs at law, of Moses Field deceased,

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to obtain a conveyance of the legal title to lot number 257 Broadway, in the city of New-York; and for an account and payment of the rents and profits, received by the testator in his lifetime, or by his executors and trustees after his death. The decree declared that the complainants were entitled to the premises, and to the rents and profits, after satisfying certain mortgages thereon. A reference was, therefore, directed to a master to take an account of such rents and profits. The decree also directed that upon the coming in and confirmation of the master's report, the executors and trustees, within six months thereafter, should pay the balance reported against them, with interest; and that the adult defendants, in person, and the infant defendants, by their guardian ad litem, should convey the premises to the complainants under the direction of the master, and surrender the possession to them; and that the infants should convey in person after they became of age. Nothing was said in the decree as to the costs of the suit. But it reserved all further and consequential directions not inconsistent with the decree; with liberty to either party to bring the cause to hearing for further directions, on the coming in of the master's report.

The defendants appealed from the decree, and gave the usual bond, for costs and damages, in the penalty of \$250, and obtained a certificate of probable cause. They thereupon applied for an order to stay the proceedings of the complainants pending the appeal. But the chancellor holding that it was not a proper case to stay the proceedings upon the decree appealed from, without security, denied the application; with liberty to the appellants, upon the coming in and confirmation of the master's report, to apply for a stay of the further proceedings of the complainants, upon the decree, on such terms as to security, or otherwise, as the court might then direct. The master reported a balance against the executors and trustees, for the rents and profits and interest, beyond the amount of the mortgages, of about \$43,000. The defendants thereupon renewed their application to stay all further proceedings upon the decree, pending the appeal.

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J. L. White & John Jay, for appellants.

D. D. Field, for the respondents.

THE CHANCELLOR. The decree in this case appears to have been final, so far as related to the payment of the balance which should be found due by the master, and so far as related to the transfer of the legal title of the premises to the complainants, and the surrender of the possession. But it is an interlocutory decree; inasmuch as the question of costs is not disposed of, and the right is reserved to the parties to set the cause down for a hearing for further directions, not inconsistent with the decree already made. And I see no reason to change the opinion which I formerly expressed, that the appellants were not entitled to have the proceedings stayed without giving security, to protect the right of the complainants as established by the decree. The fact that some of the appellants are executors and trustees, and that others of them are infants, forms no good ground for taking the case out of the general rule; though it may induce the court to change the form of the security, if it can be done without injury to the rights of the respondents.

The legal presumption, until the contrary is shown, is that the decision of the assistant vice chancellor is right. And as the merits of the case do not appear in any papers before me on this application, there is nothing to impair the force of that presumption in the least. The certificate of probable cause amounts to nothing more than that the judge who gives such certificate thinks it possible that his decision and decree may be wrong; not that it is probably wrong, for that would be inconsistent with his judgment deliberately given in the case.

It appears from the master's report that the annual rents of the premises are worth about \$3000. It would therefore be unreasonable to permit the defendants to continue in possession of the premises, and to receive such rents and profits for two or three years, without giving any security to account for them if the decree should be affirmed: as the legal presumption now is that 't will be. And if the appellants are either unable or unwilling

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to give security for such rents and profits, and to guard against waste, the respondents, who are presumptively entitled to such rents, should be permitted to take possession of the premises and receive the rents. For if the decree is reversed they will be bound to refund them.

The decree against the executors and trustees is of the same character, in reference to the question of security. They have in their hands between forty and fifty thousand dollars which they have received for rents and profits of premises decreed to belong to the complainants. And the fact that they claim to withhold the money in a fiduciary character, is no reason why they should do so without giving security to pay it, together with interest, by way of damages, if the decree shall be affirmed. They must therefore either pay the money to the respondents, subject to be refunded if the decree should be reversed, or give security that it shall be paid to the respondents, with interest by way of damages, in case the decree appealed from should be affirmed. Or if they prefer it, they may be permitted to bring the money into court; giving security to the respondents to pay any loss of interest, or other loss, which they may sustain in case that part of the decree is not reversed. But in that case the respondents must be permitted to take the money out of court upon giving security, in double the amount received by them respectively, to refund the same if the decree shall be reversed as to such money. As the amount is large, the bond to stay the collection of the money directed to be paid by the executors may be in the penalty of \$60,000 only; with sureties who can in the aggregate justify in sums equal to two sureties in that amount. And if the executors elect to bring the money into court, the bond to cover the loss of interest, &c. may be in the sum of \$6000, with two sureties who can justify in that amount. And until the respondents shall be able and willing to take the money out of court upon giving security to refund, it may be deposited in the Trust Company, upon interest. That will enable the executors to transfer to the Trust Company any bonds and mortgages held by them, which the company are willing to accept and receive as money. If either of these

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modes of securing the respondents is complied with, by the appellants, within twenty days, all proceedings upon the decree, to compel the payment of the sum reported due by the master, are to be stayed until the decision of the chancellor, or other court having jurisdiction of the case upon this appeal, shall be made.

The proceedings upon that part of the decree which directs a conveyance, and the delivery of the possession of the premises, may also be stayed upon executing the conveyance and depositing it with the clerk of the first circuit, to abide the final order and decree of the court upon this appeal, and executing and filing a bond in the penalty of \$12,000, with two sufficient sureties, who shall justify in that amount, conditioned that the appellants will not commit any waste of the premises, or suffer it to be committed; and in case that part of the appeal shall be dismissed or discontinued, or the decree appealed from shall be affirmed, that the appellants will pay the value of the use and occupation of the premises from the time of the appeal until the delivery of the possession thereof pursuant to the decree. The bonds and the sufficiency of the sureties, are to be approved by the vice chancellor of the first circuit, and within the twenty days.

And the respondent's costs of opposing this motion must be paid by the appellants.

PERRY vs. PERRY.

[s. v., *post*, p. 311.]

After a bill filed by a husband against his wife, for a separation, has been taken as confessed, the charges therein are to be taken as true, for the purposes of the suit, so far as relates to alimony, or to an allowance for the expenses of the defence.

The reference to a master, in such a case, is only to satisfy the conscience of the court that there is no collusion between the parties; and not to protect the rights of the defendant. And even if the complainant should fail to establish by legal evidence, the facts charged in the bill, the defendant will not be entitled to a decree for costs, upon a dismissal of the bill, under such circumstances.

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UPON a reference to a master to take proofs in a suit for a separation, where the defendant admits the charges in the bill to be true, either by answer or by suffering the bill to be taken as confessed for want of an answer, such defendant may appear and cross-examine the witnesses of the complainant, and may produce witnesses to disprove the charges in the bill. For the rights of the defendant are the same upon such a reference, where the charges in the bill are all admitted in the answer, as where they are admitted by neglecting to answer.

BUT where the wife is the defendant, if she attends upon the reference, and cross-examines the complainant's witnesses, such cross-examination must be at her own expense, and not at the expense of her husband. Nor is the master bound to take testimony for the defendant without compensation, in such a case.

THIS was an application, by the defendant, for an allowance to be paid to her by her husband, the complainant, to enable her to examine and cross-examine witnesses before the master, upon a reference to him to take proofs of the facts and circumstances stated in the bill in this cause. The bill was filed by the husband, against his wife, for a separation from bed and board; upon the ground of misconduct on her part, which rendered it unsafe for the complainant to live with her. It charged her with various acts of violence and cruelty, not only towards her husband, but also towards her children as well as his. The case first came before the court upon an application for alimony, and for an allowance to defend the suit. And the husband showed that he was allowing to her three dollars a week for her board, she having a sufficient supply of clothing and furniture to furnish her rooms and to clothe herself. Upon that application it also appeared that she had a considerable sum of money, belonging to the complainant, deposited in her own name, or in the names of others for her, in the savings bank; and she was allowed to draw out and use that money to defray the costs of her defence.

She excepted to the bill for impertinence; which exceptions were overruled. (*See 1 Barb. Ch. Rep. 516, S. C.*) And she was required to answer all the charges of misconduct, or the bill was to be taken as confessed against her. She then made another application for money to enable her to make her defence, and for further alimony; alleging that she had lost the money which she had drawn from the savings bank. The

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complainant consented to an order for the payment of a weekly allowance for her board. But the court being satisfied that her story as to the loss of the money was false, refused the motion for a further allowance for costs; the person with whom she boarded, and others, making affidavit that she had endeavored to persuade them to collude with her to defraud the complainant, by receiving the money for her, and pretending that she had parted with it bona fide. She subsequently suffered the bill to be taken as confessed for want of an answer; and the usual order of reference was made, to a master, to take proof of the facts and circumstances stated in the bill.

The defendant attended before the master upon the examination of the complainant's witnesses, and cross-examined one of them, her own daughter, fourteen days; when her solicitor gave notice to the master that neither he nor his client would pay the master for taking the examination, or the cross-examination, of any witnesses upon the reference. And the master thereupon refused to continue the cross-examination of any of the witnesses, for the benefit of the defendant, unless some one would become responsible for his fees. The defendant's solicitor thereupon made this application, for an order that the complainant pay to her, or her solicitor, a sum of money sufficient to pay the master's fees already incurred, and to defray the further expense of the defendant's testimony, and all other expenses in defending the suit; and for a further allowance for alimony, &c.

L. Benedict, Jr. for the defendant.

J. Rhoades, for the complainant.

THE CHANCELLOR. Even if the defendant was in a situation to ask for an increase of alimony, or for a further allowance for costs, the papers in opposition to this application show that it would be improper to grant it. It is perfectly evident that the whole story of the defendant as to the loss of the money, drawn from the savings bank, is a fiction. And there

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is also reason to fear that some witnesses who have made affidavits in behalf of the defendant, have been suborned to commit perjury in support of this application; for the mere purpose of wounding the feelings and traducing the character of the complainant. I allude particularly to the affidavits of the persons who have been induced to swear that it was the general report in the neighborhood where the complainant formerly lived; that he killed his first wife by cruel treatment. Independent of the degraded character of the deponents, it is wholly incredible that the complainant should have had the reputation of such cruelty to his first wife, and that her numerous relatives and friends who lived in the same neighborhood should never have heard of it. I have very little doubt, therefore, that the witnesses who have sworn to this general report in the neighborhood, have been induced to swear to what they knew to be false. The affidavits in relation to the depositions of J. B. Rowley and of Margaret Gantz, render it also probable that other depositions may have been obtained in the same way; and that the deponents have been made to swear to many things which they did not suppose were contained in the *ex parte* affidavits which purport to have been made by them.

But what is conclusive against this application is the fact that the defendant has suffered the bill to be taken as confessed against her. And for the purposes of this suit, so far as relates to alimony or to an allowance for the expenses of her defence, the charges in the bill are to be taken as true. The reference, therefore, is only to satisfy the conscience of the court that there is no collusion between the parties; and not to protect the rights of the defendant. And even if the complainant should fail to establish by legal evidence the facts charged in the bill, the defendant will not be entitled to a decree for costs, upon a dismissal of the bill, under such circumstances. It is not sufficient, in this stage of the suit, for the defendant to make an affidavit that all the *material* charges in the bill are false; without stating what she considers material, and what is immaterial in her view of the case. The proper time to deny the truth of the charges was when she had the right of putting in her

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answer on oath, as she was required to do by the order of the court; if she had any defence to make to the suit. Had she done that, the court would have seen what statements in the bill she meant to swear were false, and what she admitted to be true. And she would have been in a situation to be liable to a prosecution for perjury, if her answer could be proved by two or more competent witnesses to be false in any material part thereof.

Upon a reference of this kind, where the defendant admits the charges in the bill to be true, either by answer or by suffering the bill to be taken as confessed for want of an answer, the court allows the defendant to appear and cross-examine the witnesses produced by the complainant, and to produce witnesses to disprove the charges in the bill, for the mere purpose of eliciting the truth, to aid the conscience of the court; and not for the purpose of protecting any rights of the defendant. For the rights of the defendant are the same upon a reference, where the charges in the bill are all admitted in the answer, as where they are admitted by neglecting to answer. If the defendant, therefore, thinks proper to attend upon the reference and cross-examine the witnesses of the complainant, or to produce evidence on her part, she is at liberty to do so. But it must be at her own expense, and not at the expense of her husband; for, as between the complainant and defendant as parties, she has admitted the charges made against her. And the master is not bound to take the testimony for her without compensation. For these reasons, this application must be denied.

The complainant's counsel ask for an order that the costs be paid by the new solicitor for the defendant, who makes this application for her. But it would be improper to charge him personally with costs, without giving him an opportunity to be heard in reference to the affidavits which are read against him on that motion. The court, however, has the power to charge the costs upon the defendant, who has improperly made this application for the mere purpose of harassing the complainant, and putting him to further expense and costs. The complainant is at liberty, therefore, if he thinks proper to do so, to retain:

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the taxable costs of opposing this motion, out of the allowance heretofore directed to be paid to the defendant for alimony pending the suit. There is the more reason for doing this, as it appears that she has kept the money heretofore paid to her for alimony; and has suffered him to be sued for her support.

TALLMADGE vs. TALLMADGE and CUSHMAN.

Where a defendant is examined by the complainant as a party only, he is merely to be examined as against himself, and is not to be cross-examined by his own counsel. But if the complainant examines him as a witness against his co-defendant also, such co-defendant is entitled to cross-examine him, as a matter of course, without any order to that effect.

PETITION by defendant Cushman, for leave to examine his co-defendant Tallmadge as a witness for the petitioner, before the master, upon a reference. The petition stated that on the reference the counsel for the complainant examined the defendant Tallmadge as a witness; and that he was a material witness for the petitioner, and was not interested in the matter to which he was sought to be examined.

J. P. Cushman, the petitioner, in person.

J. Blunt, for the complainant.

THE CHANCELLOR. The complainant having examined Mr. Tallmadge as a witness, the defendant Cushman had a right to cross-examine him, as a matter of course, and without an order to that effect. If he was examined as a party merely, he could only be examined as against himself, and could not be cross-examined by his own counsel. But if his testimony can, by any possibility, affect the rights of Cushman, he is made a witness in the cause, and consequently Cushman has a right to cross-examine him.

Order according to prayer of petition.

SPEAR and others vs. WARDELL and others.

[Reversed, 1 N. Y. 144; How. Cas. 572.]

The assignee of a debtor's property, under the 16th, 17th, and 18th sections of the non-imprisonment act of April, 1831, takes such property as a trustee for the benefit of all the creditors of the assignor, rateably; and not for the exclusive benefit of the particular creditor who has sued out a warrant against the assignor; or even for the exclusive benefit of the particular class of creditors who were in a situation to sue out a warrant against him.

The act to abolish imprisonment for debt is based upon the principle that equality among creditors is equity, in the case of an insolvent debtor. And the fraudulent debtor, pending the proceedings against him, by one or more creditors, for an actual or intended fraud, is not permitted to assign or dispose of his property, or any part of it, for the purpose, or with a view, to give a preference to other creditors.

But he is entitled to a discharge from imprisonment upon his paying, or securing the payment of the creditors who have proceeded against him; or giving security to retain his property in its then situation, until they have had a reasonable time to exhaust their remedies at law, and to file a creditor's bill to reach his property; or upon his making an assignment of his property to such assignee as may be appointed, for that purpose, by the judge before whom the proceedings are had, for the benefit of *all* the creditors *rateably*.

It is not a fraud upon the act, *it seems*, for the debtor, pending the proceedings against him, to make a general assignment of all his property, with proper inventories showing the particulars thereof, and the names of his creditors, with the amounts due to them respectively, to a proper and responsible assignee, for the benefit of all his creditors rateably; and giving to such assignee the same authority to convert the property into money and to apply it to the payment of his debts, and for the same compensation to which an assignee appointed under the act would be entitled.

But any other disposition of his property would be a fraud upon the act; and would render the assignment void as against the prosecuting creditor. And the debtor who has been guilty of such a fraud ought not to be discharged from imprisonment, upon making a mere formal assignment of his property, after having committed such a fraud upon the rights of the prosecuting creditor.

Creditors by judgment merely cannot file a bill in the court of chancery to set aside an assignment, by the judgment debtor, which is subsequent to the lien of their judgment, upon the assigned property, even though it were intended to defraud them. For if such an assignment embraces real estate upon which the judgment is a lien, it will not prevent the judgment creditor from selling the property under execution upon his judgment, which judgment, upon its face, overreaches the assignment. And as respects personal property, judgment creditors cannot file a bill to set aside an assignment thereof, until an execution has been issued, so as to create a lien.

The cases of *The People v. Abell*, (3 Hill's Rep. 109,) and *Berthelon v. Betis*, (4 Id 577,) commented upon.

Wood v. Bolard and al. (8 Paige's Rep. 556,) explained

Spear v. Wardell.

THIS case came before the chancellor upon an application of H. B. Wardell to dissolve an injunction; and upon a cross-motion, on the part of the complainants, for the appointment of a receiver. The complainants were judgment creditors of Charles & Charles E. Wardell, merchants in New-York, who failed for about \$200,000; which was nearly seven times the amount of the value of all their property and effects. On the 5th of November, 1846, a few days after the recovery of the judgment, the complainants applied to C. & C. E. Wardell, who had bills, notes, and other evidences of debt, belonging to them as co-partners, more than sufficient to pay the judgment of the complainants, and requested them to apply the same, or so much thereof as might be necessary, to the payment of such judgment. The Wardells refused to do so; upon the ground that it would be giving to the complainants a preference over other creditors. But the complainants were told by them that if their creditors, upon being called together, would not consent to discharge them, on receiving a per centage upon their several debts and liabilities according to the estimated value of their property and effects, as recommended by a committee of such creditors, they would then assign all their property in trust to pay their creditors rateably out of the proceeds of the same. The complainants, on the same day, applied to the circuit judge of the first circuit, and obtained a warrant against C. & C. E. Wardell, under the second subdivision of the 4th section of the act of April, 1831, to abolish imprisonment for debt and to punish fraudulent debtors; upon the ground that they had rights in action, or interests in stocks, moneys, and evidences of debt, which they unjustly refused to apply to the payment of the judgment of the complainants. Upon the return of the warrant, the proceedings were adjourned from time to time until the 28th of November, 1846; when the circuit judge decided that the allegations of the complainants, upon which the warrant had been granted, were substantiated by them, and that C & C. E. Wardell must be committed, in pursuance of the directions of the act of April, 1831. On the 21st of November, 1846, after their arrest, and while the proceedings upon the warrant

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were pending before the circuit judge, the defendants C. & C. E. Wardell, made a general assignment of all their copartnership property and effects to the defendant Henry B. Wardell, in trust to pay all the creditors of the firm rateably; and on the same day, C. Wardell also assigned to Henry B. all his individual property and effects, in trust to pay the individual creditors of the assignor rateably, and to apply the surplus, if any, to the payment of all the copartnership creditors in the same manner. After the decision of the circuit judge that C. & C. E. Wardell must be committed, they presented to him an inventory of their estate as it then existed, and an account of their creditors, and asked that their property might be assigned as directed by said act. And upon a hearing of the parties, the circuit judge decided that the complainants had failed to satisfy him that the proceedings of the petitioners were not just and fair, or that such petitioners, or either of them, had concealed, removed or disposed of his or their property, with intent to defraud his or their creditors; notwithstanding such assignments to the defendant H. B. Wardell for the benefit of all their creditors rateably pending the proceedings upon the warrant. He therefore directed an assignment to S. P. Nash, in pursuance of the provisions of the act. And such assignment having been made and certified, as by the act is required, the circuit judge granted a discharge according to the directions of the 17th section of the act. The complainants thereupon, without having taken out any execution upon their judgment, filed their bill in this cause against C. & C. E. Wardell, and against H. B. Wardell, their voluntary assignee in the assignments of the 21st of November, 1846, to reach the assigned property in the hands of the latter, and to have it applied to the payment of their debt.

S. P. Nash, for the complainants.

H. F. Clark, for the defendants.

THE CHANCELLOR. The question does not appear to be presented in this case, whether the assignmen^t made under and

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in pursuance of the 16th and 17th sections of the act to abolish imprisonment for debt and to punish fraudulent debtors, creates a trust for the exclusive benefit of the particular creditors upon whose application the warrant against the debtor has been issued. But as the whole claim of the complainants is based upon the supposition that after they had taken out a warrant, if they should succeed in obtaining an order for commitment, their judgment debtors must pay or secure the debt due to the plaintiffs in such proceeding, or make an assignment for their exclusive benefit, or at least an assignment which would give them a preference, it may be necessary to examine the provisions of the act of 1831 in reference to this question.

In the case of *The People v. Abell*, (3 *Hill's Rep.* 109,) Mr. Justice Bronson intimated an opinion that the discharge of the debtor under the 17th section of the act of 1831, only exonerated him from being proceeded against, for fraud, by those creditors who had previously commenced suits; and that only those who were entitled to apply for a warrant were entitled to dividends of the assigned property. But as that question was not involved in the case, he said it needed not be settled at that time. The various provisions of the act of 1831, and of the title of the revised statutes referred to therein, do not appear to have been examined by him. This intimation of his opinion, therefore, is not entitled to the ordinary weight of an *obiter dictum* of that distinguished judge; although, if right, it is still in conflict with the claim of exclusive priority set up by the complainants in this case.

In *Berthelon v. Betts*, (4 *Hill's Rep.* 577,) which came before the late Justice Cowen, six or seven months afterwards, the question as to the class of creditors for whose benefit the assignment was made, was not presented to his consideration; although it would probably have been involved in the application, if the assignee under the act of 1831 had thought proper to appear and oppose the application upon the ground that other creditors had presented claims to him against the fund in his hands. The only questions considered by the judge in that case, therefore, were whether the act of 1831 was an insolvent

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act which was abrogated or suspended by the general bankruptcy law; and whether a subsequent decree in bankruptcy overreached an assignment previously made, under the first mentioned act. Both of these questions he decided against the assignee in bankruptcy; who claimed that the previous assignment under the act of 1831 was void as against the subsequent decree in bankruptcy, upon the ground that the petition in bankruptcy had been presented, under the voluntary provisions of the bankrupt law, a few days previous to the coerced assignment of the debtor under the act of April, 1831. The right of priority claimed by the complainants is therefore wholly unaffected by any of the judicial decisions cited by their counsel upon the argument. For in relation to the case of *Wood v. Bolard & Pickard*, (8 *Paige's Rep.* 556,) it was an ordinary creditor's bill, founded upon the return of an execution unsatisfied. And all that this court meant to decide in that case, was that an assignment made for the purpose of defrauding the complainants in the proceedings which they had instituted under the act of April, 1831, could not be set up, by the fraudulent assignee, to protect the property against the creditor's bill, filed by the defrauded parties to reach such property in this court. But there is no intimation in that case that the complainants, by the institution of the proceedings under the act of 1831, obtained any right of priority over other creditors, of their judgment debtor, who had equal claims to be paid out of his property. The decision was based entirely upon the principle that the act had deprived a fraudulent debtor, who was proceeded against, under the provisions of that act, for the fraud which he had already committed, or was about to commit, of the right or power to make an assignment giving to other creditors a preference over those who had already instituted proceedings against him.

There are three distinct cases in which an assignment of the debtor's property may be obtained under the provisions of the act of 1831. *First*, where the debtor has been proceeded against adversely, by one or more of his creditors: *Second*, when he has been sued for a debt for which he is not liable to be arrested, or imprisoned, except by proceedings under that act,

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and where no such proceedings have been instituted against him; and *Third*, where he has been indicted and convicted of a misdemeanor for fraudulently removing, secreting, or otherwise disposing of any of his property, for the purpose of defrauding his creditors. In the two first cases, the assignment can only be obtained upon the voluntary application of the debtor for leave to make such assignment. But in the last case, the assignment of his property is obtained upon an adverse proceeding against him, by his creditors, as in the case of debtors imprisoned in the state prisons, or in county jails or penitentiaries, upon convictions for crimes. (*Laws of 1831, p. 402, § 27. 2 R. S. 14, § 1.*) In the two first cases, the proceedings on the part of the debtor are precisely the same; except that where he applies immediately, after the judge has decided that he is liable to commitment for the fraud of which he has been guilty no notice of his application need be given to other creditors. But the form of the inventory and the effect of the assignment is the same in both cases. As to the form of the inventory, the person who drew the act of April, 1831, probably by inadvertence, substituted the sixth for the fifth article of the title of the revised statutes relative to the assignment of the estates of non-resident, absconding, insolvent, or imprisoned debtors. For the 13th section of the act of 1831 provides that the debtor, upon presenting his petition, shall deliver an account of his *creditors*, and an inventory of his estate, similar in all respects to the account and inventory required of the debtor by the *sixth* article of title first and chapter five of the second part of the revised statutes. But by referring to the sixth article, which relates to the discharge of a debtor who is imprisoned upon an execution for debt, it will be seen that no account of his *creditors* is required to be annexed to his petition. That article of the revised statutes requires an account and inventory of the debtor's property and effects, not only as they exist at the time of preparing his petition, but also as they existed at the time of his imprisonment; which last provision is wholly inapplicable to the case of a debtor who has never been imprisoned, either because no warrant had been taken out against him, or because he applied

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immediately upon the decision of the judge against him, or because he had given a bond to apply for an assignment, as authorized by the 4th subdivision of the 10th section of the act. Or, the person who drew this 13th section of the act of 1831 may have intended to adapt it to the case of an actual commitment of the debtor, and a subsequent petition by him for leave to make an assignment of his property for the purpose of obtaining a discharge from such imprisonment; in order to obtain a statement of his property as it existed when he was originally committed, as well as at the time of his discharge; without seeing that this thirteenth section, as drawn, would not meet the different cases intended to be provided for. But, whatever may have been the intention of the framer of this section, as to the form of the inventory, I do not see that it has any practical bearing upon the question as to who is to take the beneficial interest in the assigned property under the assignment provided for in the 16th section. The sixth article of the title of the revised statutes, referred to in the 13th section of the act of 1831, vests the assigned property in the assignee for the benefit of the creditors by whom the assignor was imprisoned, and for their benefit only. (2 R. S. 32, § 9. *Idem*, 47, § 33, *sub.* 4.) And the surplus, if any, is to be paid to the assignor or his legal representatives. (*Idem*, 48, § 43.) But the 16th section of the act of 1831 does not refer to this sixth article of the revised statutes, to determine the effect of an assignment made under the provisions of that section. It refers to the *fifth* article. The assignment provided for under that fifth article is a general assignment, which vests in the assignee all the interest which the assignor had, at the time of executing the same, in any estate or property, real or personal, at law or in equity, and any contingent interest which may become vested in the assignor within three years thereafter. (2 R. S. 30, § 9. *Idem*, 21, § 28.) And a subsequent provision of the revised statutes directs the assignees, in whom the property is vested under this *fifth* article, to distribute the proceeds thereof rateably among those who were creditors of the assignor at the time of the execution of the assignment by him. (*Idem*, 47, § 33, *sub.* 2.)

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The 17th section of the act of 1831, if taken by itself, would seem to favor the construction which Mr. Justice Bronson was inclined to put upon it, in the case of *The People v. Abell*, before referred to; so as to confine the dividends to be made by the assignee, to a class of creditors who, at the time of the making of the assignment, were in a situation to apply for a warrant against the assignor, for some fraud which he had then committed or was about to commit. But that section refers to subsequent provisions of the act for the class of creditors who are entitled to dividends under the assignment; and no provision for dividends is made in that section. Nor is there any thing in the subsequent parts of the act providing for the making of dividends, by the assignee, except in the next section; which section refers to the eighth article of the title of the revised statutes before mentioned, (2 R. S. 40,) for the powers and duties of the assignee, and the making of dividends. We must, therefore, look to the provisions of that article of the revised statutes, in connection with the fifth, for the purpose of seeing for whose benefit the assigned property is vested in the assignee, and who are entitled to dividends of the proceeds thereof, under an assignment made by the debtor himself, according to the directions of the 17th section of the act of April, 1831. The first section of that eighth article declares that the assignees appointed under any of the preceding articles of that title, in the several cases therein contemplated shall be trustees of the debtor, for the benefit of his creditors; without specifying any class. And that such trustees shall be vested with the powers and authority, and shall be subject to the control, *obligations*, and responsibilities thereafter declared in respect to trustees. And the 6th section merely specifies the time to which the assignment under the provisions of the different articles shall relate.

The only section of that article which directs the trustees as to the class of creditors among whom the proceeds of the assigned property shall be distributed is the thirty-third. (2 R. S. 47.) That section directs different modes of distribution in the case of proceedings under the different articles of that title. So that we must still refer to the 17th section of the act of 1831

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for the purpose of ascertaining to which of the five articles of the revised statutes the assignment made by the debtor, under that act, assimilates itself. That section declares that the assignment shall be executed with the like effect as is declared in the fifth article of the revised statutes. And the actual effect of an assignment under the provisions of the fifth article, is to vest the property of the debtor in the assignee, for the benefit of all who were his creditors at the time of the execution of the assignment, in proportion to the amount of their respective demands; without giving a preference to any, except such as have obtained liens upon the assigned property, or those who are entitled to priority under the laws of the United States. (2 R. S. 42, § 7, sub. 7. *Idem*, 46, §§ 32, 33.) No other sensible construction, therefore, can be given to the imperfect provisions of the 16th, 17th and 18th sections of the act of April, 1831, than to hold that the assignee takes the property of the debtor as a trustee for the benefit of all the creditors of the assignor rateably; and not for the benefit of the particular creditor who has sued out a warrant against the assignor; nor even for the particular class of creditors who were in a situation to sue out warrants against him. In other words, the act appears to be based upon the principle that equality among creditors, in the case of an insolvent debtor, is equity. The fraudulent debtor, therefore, pending the proceedings against him by one or more creditors, for an actual or intended fraud, is not permitted to assign or dispose of his property, or any part of it, for the purpose or with a view to give a preference to other creditors. But he is to be discharged from imprisonment upon paying, or securing the payment of the creditors who have proceeded against him; or retaining his property in its then situation until they shall have had a reasonable time to exhaust their remedies at law and file a creditor's bill to reach his property, or upon making an assignment of his property to such assignee as may be appointed for that purpose, by the judge before whom the proceedings are had, for the benefit of all his creditors rateably.

I am also inclined to think it is not a fraud upon the act, for the debtor, pending the proceedings against him, to make a

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general assignment of all his property, with proper inventories showing the particulars of his property, and the names of his creditors with the amount due to them respectively, to a proper and responsible assignee for the benefit of all his creditors rateably, giving to such assignee the same authority to convert the property into money, and apply it to the payment of his debts, and for the same compensation, which an assignee appointed under the act would be entitled to. But any other disposition of his property would be a fraud upon the act; and would render the assignment void as against the prosecuting creditors. And the debtor who has been guilty of such a fraud, ought not to be discharged from imprisonment upon making a mere formal assignment of his property, after having committed such a fraud upon the rights of the prosecuting creditor.

In the case under consideration, the judge was probably right in granting the warrant in the first instance. For the debtors had no right to insist upon waiting until they could endeavor to persuade their creditors to discharge them from their debts, before they would consent to make a general assignment for the benefit of all their creditors rateably, or give to these complainants, upon their demand of the same, a rateable proportion of the property of the insolvent firm.

But I do not see that there is any thing in the bill of the complainants to show that the assignment made by the defendants C. & C. E. Wardell, pending the proceedings against them, was not perfectly just and equitable, in reference to the rights of all their creditors to an equal participation in the proceeds of the assigned fund. Nor is there any thing to show that the assignee was not a perfectly responsible and proper person to be entrusted with the winding up of this insolvent concern, and the distribution of the fund among all the creditors of the assignors, according to their equitable rights as such creditors. If the complainants, therefore, had issued an execution and had it returned unsatisfied before they commenced this suit, I do not think they would have been entitled to set this assignment aside, upon the ground of fraud; even if their bill had been filed before the subsequent assignment to the trustee

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appointed under the act. It is not necessary, however, to decide that question here; for, as creditors by judgment merely, the complainants were not in a situation to file a bill to set aside an assignment by the judgment debtors, even if it was in fact fraudulent as against them. If the assignment embraced any real estate upon which their judgment was a lien, it did not prevent them from selling the property under execution upon their judgment; which judgment upon its face overreached the assignment. And as respects the personal property liable to execution, the complainants were not in a situation to file a bill until they had sued out an execution. (*Beck v. Burdett*, 1 *Paige's Rep.* 305.) And if the property passed to the subsequent assignee, under the assignment made by order of the circuit judge, in consequence of any fraud in the previous assignment, such subsequent assignee, who represented the rights of all the creditors for whose benefit the last assignment was made, was the only person who had a right to file a bill to set aside the previous assignment upon the ground that it was fraudulent as against the creditors of the assignor.

For these reasons the injunction in this case was improperly allowed, and it must be dissolved. And the motion on the part of the complainants for the appointment of a receiver must be denied with costs.

TAYLOR vs. BRUEN and others.

The sixth section of the title of the revised statutes relative to unauthorized banking, applies to foreign as well as to domestic corporations. And foreign corporations are still prohibited from keeping any office in this state for the purpose of receiving deposits, or for discounting notes or bills.

Where such a corporation authorizes one of its officers, or an agent, to attend from time to time at certain known places in this state, for the purpose of receiving deposits, or for the purpose of discounting notes or bills, with the funds of the corporation, and for its benefit, such known places of attendance are to be considered as offices of discount and deposit, of the corporation, illegally kept for the purposes prohibited by the statute.

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And the officer or agent of a foreign corporation who thus carries on the business of discounting notes and bills in this state, with the funds of such corporation, and for its benefit, renders himself personally liable to the penalties prescribed by the 7th section of the act relative to unauthorized banking.

He cannot, therefore, be compelled to make a discovery of such violation of the statute, to aid the defence in a suit at law, brought in his own name, upon a note thus discounted by him as the officer or agent of a foreign corporation.

A defendant is not bound to answer or disclose any facts showing that he has been guilty of any act for which he is liable to an indictment, or which can subject him to a penalty, or forfeiture.

THIS was an appeal by Herman Bruen, one of the defendants in this cause, from an order of the vice chancellor of the first circuit, denying an application to dissolve an injunction. The facts, as stated in the complainant's bill, were substantially as follows: Bruen, the appellant, was the president and agent of the Commercial Bank of New Jersey. And as such president and agent, he was in the habit of attending at certain known places in the city of New-York, with the funds of that foreign banking corporation, to discount notes for its use and benefit. In May, 1845, the complainant made his note for \$500, at six months, and payable to the order of W. W. Chester & Co.; which note was endorsed by them as accommodation endorsers, for his use and benefit, and was discounted for him in the city of New-York by Bruen, with the funds of the Commercial Bank, and for its use and benefit, in the ordinary course of his agency for the bank in discounting notes at such known places of attendance for that purpose. The defendant Bruen having brought a suit upon the note in his own name, the complainant filed his bill in this cause to obtain a discovery from Bruen, of the alleged violation of the restraining law, to aid the complainant and his accommodation endorsers in their defences in the suit at law upon the note; and for an injunction to restrain the proceedings in the suit at law until such discovery could be had. An *ex parte* injunction having been granted, Bruen moved to dissolve the same, upon the matter of the bill only; which application was denied.

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W. Watson, for the appellant.

A. Taber, for the respondent.

THE CHANCELLOR. If the charges in the complainant's bill are true, the discounting of this note by Bruen, as the president and agent of the Commercial Bank of New Jersey, was not a single or isolated transaction ; but it was in violation of the provisions of the laws of this state against unauthorized banking. And the complainant and his endorsers have a good legal defence to the suit, upon such note ; which suit has been brought for the benefit of the bank. The sixth section of the title of the revised statutes relative to unauthorized banking, (1 R. S. 712,) applied to foreign corporations, as well as to those which were incorporated by the laws of this state. And foreign corporations are still prohibited, by that section, from keeping any office in this state for the purpose of receiving deposits, or for discounting notes or bills. And where such a corporation authorizes one of its officers, or an agent, to attend from time to time at certain known places, in this state, for the purpose of receiving deposits, or for the purpose of discounting notes or bills with the funds of the corporation, and for its benefit, such known places of attendance must be considered as the offices of discount and deposit of the corporation, illegally kept for the purposes prohibited by the statute.

The bill in this case distinctly charges that the suit at law is brought in the name of Bruen for the sole benefit of the bank, and for the purpose of defrauding the defendants in that suit of the benefit of his testimony on the trial. Bruen is therefore bound to make the discovery sought for by this bill, if he could have been compelled to give evidence of the facts charged, upon the trial of the suit at law, in case such suit had been brought in the name of the bank as the real party in interest. And he could, in that case, have been compelled to give such evidence, unless the facts charged in the bill show that he has been guilty of an offence which is indictable, or which will subject him to a penalty or forfeiture. *'Matter of Kipp*, 1 *Paige's Rep*

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601. *City Bank of Baltimore v. Bateman*, 7 Harr. & John. Rep. 104.)

It remains to be considered, therefore, whether the bill in this case shows that the appellant Bruen has been guilty of any thing for which he is liable to an indictment, or which could subject or expose him to a penalty or forfeiture. For if it does, he is not bound to answer and disclose the facts. (2 R. S. 405, §71.) And upon a careful examination of the several provisions of the title of the revised statutes relative to unauthorized banking, I have arrived at the conclusion that if the appellant, as the agent and president of this foreign corporation, has carried on the business of discounting notes and bills in the city of New-York, as charged by the complainant, and under the circumstances mentioned in the bill in this cause, he has rendered himself personally liable to the penalty prescribed by the seventh section of that title. (1 R. S. 712.)

By referring to the fourth section, it will be seen that, for an offence of a similar character, the directors and other officers and agents of the corporation are, in terms, made personally liable for the penalty, for a violation of the provisions of the statute which are prohibitory upon the corporation. And in reference to the offences prohibited in the sixth section, of which the offence charged in the complainant's bill is one, the seventh section declares that every person, and every corporation, and *every member of a corporation*, who shall contravene either of the provisions of the sixth section, or shall directly or indirectly assent to such violation, shall forfeit \$1000. The terms "every member of a corporation," are certainly broad enough to reach the defendant Bruen, who is charged to have acted as the president of the corporation, as well as its agent, in the violations of the statute mentioned in the complainant's bill. The statute also subjects every person to the penalty who assents to the violation of its provisions. And Bruen must certainly be considered as having assented to the violation of the statute, by the corporation of which he was president, when he actually acted as its agent for the purpose of contravening the provisions of the law. He cannot, therefore, be compelled to make the dis-

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covery, sought by this bill, in aid of the defence at law. And for that reason, the injunction restraining him from proceeding in the suit at law until he should have answered this bill, and made the discovery called for therein, should not have been granted.

The order appealed from is erroneous and must be reversed. And the injunction must be dissolved with costs.

Matter of FOWLER, a lunatic.

The petition for a commission of lunacy against a non-resident, must show that the alleged lunatic is the owner of property situated in this state. It is not sufficient to state that fact in the affidavits annexed to the petition.

A PETITION was presented praying for a commission in the nature of a writ *de lunatico inquirendo*. The alleged lunatic formerly resided in Westchester county, but was now a resident in the state of Ohio. The petition did not set forth that he had any property in this state; although that fact was sworn to in the affidavits annexed to the petition.

A. Nash, for the petitioner.

The CHANCELLOR said the court had no jurisdiction to issue a commission, unless the alleged lunatic resided here, or was the owner of property in this state. And that in case of his non-residence, the fact of his owning property here must be stated in the petition. It was not sufficient to set it forth in the affidavits.

Application denied.

BALDWIN *vs.* LATSON and others.

[Concurred in, 88 N. Y. 65.]

The provisions of the statute making it a criminal offence for an attorney, counsellor or solicitor to buy any bond, bill, or other chose in action for the purpose of bringing a suit thereon, applies to the purchase of a chose in action for the purpose of instituting a suit thereon in equity, as well as to a purchase in order to bring a suit thereon at law.

In the court of chancery, the suit upon a chose in action must be brought in the name of the real owner thereof. And if it has been purchased in violation of the positive prohibition of a statute, the only defence which can be set up in that court, founded upon such prohibition, is that the title to the chose in action did not pass to the complainant, by the illegal purchase and the assignment to him.

The object of the statute prohibiting the purchase of choses in action, by attorneys, &c. for the purpose of bringing suits thereon, was to prevent attorneys and solicitors from purchasing debts or other things in action, in order to obtain costs by prosecuting the same. It was not intended to prevent such a purchase for the honest purpose of protecting some other important right of the assignee.

Whether the chancellor has any power, except upon appeal, to open a regular decree made by the assistant vice chancellor? *Quære.*

The case of *Hall v. Gird*, (7 *Hill's Rep.* 586,) commented on.

THIS was an application by J. W. Latson, one of the defendants, to open the order closing the proofs in this cause, and all subsequent proceedings therein, and to let him in to prove the defence set up in his answer. The bill was filed to foreclose a mortgage upon the Pearl-street House, in the city of New-York, there being several prior mortgages upon the same premises. The bond and mortgage were assigned to the complainant a few days before the commencement of this suit. And the defendant Latson in his answer set up as a defence that the complainant was an attorney of the supreme court, and a solicitor in chancery, and that he purchased the bond and mortgage for the purpose of foreclosing the mortgage by suit in this court. But the defendant Latson allowed an order to close the proofs to be regularly entered, without taking any testimony to show that the complainant was an attorney and solicitor, or that the bond and mortgage were purchased for the purpose of bringing a suit thereon; the complainant not having filed the bill as solicitor, but having employed another

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solicitor to foreclose the bond and mortgage for him. After the proofs were closed, the complainant applied for a reference of the cause to the assistant vice chancellor of the first circuit for hearing and decision. Counsel was employed to resist that motion, but through inadvertence he neglected to attend to it; and an order of reference was subsequently obtained by default. The cause was afterwards noticed for hearing before the assistant vice chancellor, and there being no proof to establish the defence set up in the answer, the usual decree of foreclosure and sale was entered.

In opposition to the motion to open the order to close the proofs and to vacate the subsequent proceedings, the complainant insisted that the facts stated in the answer constituted no defence to the suit, or that the defence, at most, was merely technical. He also produced affidavits to show that the bond and mortgage were not purchased with a view to obtain costs upon a foreclosure thereof; that he was in no way interested in the costs of the solicitor in the cause; and that the bond and mortgage were purchased under the advice of counsel for the purpose of foreclosure, so as to aid the complainant in having the rents and profits applied to keep down the incumbrances upon the mortgaged premises pending the litigation by him in another suit relative to the ownership of the equity of redemption in the mortgaged premises. He also insisted that the chancellor was not authorized to open a regular decree made by the assistant vice chancellor, except upon an appeal.

D. P. Barnard, for the complainant.

S. Sherwood, for the defendant Latson.

THE CHANCELLOR. The statute makes it a criminal offence for an attorney, counsellor or solicitor, to buy any bond, bill, promissory note, bill of exchange, book debt, or other thing in action, for the purpose of bringing any suit thereon. And this provision of the statute unquestionably applies to the purchase of a chose in action for the purpose of instituting a suit

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thereon in equity, as well as to the purchase with the intention of bringing a suit thereon at law. The case of *Hall v. Gird*, (7 *Hill's Rep.* 586,) only decides that the particular remedy given to the defendant, by a subsequent section of the statute, does not apply to suits in chancery. In this court the suit must be brought in the name of the real owner of the chose in action. And if it has been purchased in violation of a positive prohibition of a statute, the only defence which can be set up here, founded upon such prohibition, is, that the title to the chose in action did not pass to the complainant by the illegal purchase and assignment thereof to him. I am inclined to think that would have been a good defence in this case, if this bond and mortgage had been in fact purchased in violation of the statute.

If the facts are as stated in the affidavit on the part of the complainant, however, I think the purchase of this bond and mortgage was not an indictable offence within the statute, and that the assignment passed the title to the complainant. The purchase, although within the letter, was not within the spirit and intent of the statute. The object of the statute was to prevent attorneys and solicitors from purchasing debts, or other things in action, for the purpose of obtaining costs by a prosecution thereof, and was never intended to prevent the purchase for the honest purpose of protecting some other important right of the assignee. Here the fact that the complainant had no interest whatever in the costs of the foreclosure, for his own benefit, and that he was advised by his counsel in the other suit that the purchase and foreclosure of this bond and mortgage were essential to the preservation of the interest which he previously claimed in the mortgaged premises, show that the case was not within the mischief which this statute was intended to guard against. Under the former statute on this subject, which absolutely prohibited the purchase by an attorney or solicitor, except for certain specific purposes, (*Laws of 1818*, p. 278, § 1,) the supreme court held that the purchase of a judgment for the purpose of protecting another debt which the purchaser had against the defendant in the judgment, was not

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within the mischief of the statute; and that the title to the judgment passed to him by the assignment. (*Van Rensselaer v. The Sheriff of Onondaga*, 1 *Cowen's Rep.* 443.) There are no reasonable grounds to believe, therefore, that the defendant would succeed in establishing that the title of this bond and mortgage did not pass to the complainant by the assignment from Reed, even if the decree could be opened and the testimony taken in this cause.

Again; it is very doubtful, at the least, whether the chancellor has any power to set aside a decree which has been regularly made by the assistant vice chancellor, and to let in the defendant to make out a new case by proof. The remedy of the defendant appears to have been, after the order of reference was regularly entered by default, owing to the inadvertence of counsel, to get the assistant vice chancellor to stay the hearing of the cause, until an application could be made to the chancellor to open the order of reference, and the order to close the proofs, and to permit the testimony to be taken in the cause. The motion of the defendant must be denied, with costs.

MOULTON vs. MOULTON.

Where a bill is filed by a wife against her husband, for a separation from bed and board on account of cruel treatment, and an answer on oath is waived, and the defendant suffers the bill to be taken as confessed, the complainant cannot be examined by the master, upon the reference, to prove the acts of cruelty charged in the bill.

The object of the 166th rule of the court of chancery was to enable the complainant to make out her case where the defendant was an absentee, or where he had neglected to answer and make the discovery called for by the bill. And it was not intended to apply to a case where the complainant, by waiving an answer on oath, had deprived the defendant of the benefit of his answer to explain the transactions complained of.

No decree for a separation will be granted where the acts of cruelty set forth in the bill occurred so long since that the statute of limitations has attached.

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THIS was a bill by the complainant against her husband, for a separation from bed and board, on account of alleged cruel treatment. The complainant waived an answer on oath as to the acts of cruelty charged in the bill, and the defendant suffered the bill to be taken as confessed. Upon the reference the master examined the complainant herself to prove acts of cruelty; most of which acts were alleged to have occurred from ten to twenty years before the filing of her bill in this cause.

Lucius Pitkin, for the complainant.

C. Roosevelt, for the defendant.

THE CHANCELLOR. This was not a proper case for the examination of the complainant to prove the acts of cruelty charged in her bill. The object of the 166th rule was to enable the complainant to make out her case where the defendant was an absentee, or where he had neglected to answer and make the discovery called for by the bill; and was never intended to apply to a case where the complainant, by waiving an answer on oath, had deprived the defendant of the benefit of his answer to explain the transactions complained of. The testimony of the wife, therefore, must be laid entirely out of the case in deciding the question whether the husband has been guilty of such acts of cruelty as to justify this court in decreeing a separation. Again; most of the acts of alleged cruelty which are testified to by the wife, as having occurred when no one was present except the husband and wife, took place from ten to twenty years since, and are therefore barred by the statute limiting the time for bringing suits in equity.

The alleged acts of cruelty which are charged as having taken place within the last few years, appear to have been the natural result of the complainant's own misconduct, in charging her husband with offences which were calculated and intended to irritate him. And they are not proved by those who were present when the difficulty first occurred, except in one or two instances, in which it is perfectly evident the complainant was clearly

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in the wrong. Under such circumstances it would be a perversion of the object for which the statute on this subject was passed, to decree a separation; although the husband does not resist the application.

The complainant's bill is therefore dismissed. And the defendant must take his wife home, and provide for her support.

PERRY vs. PERRY.

The section of the act of April, 1824, giving to a husband the right to file a bill against his wife for a separation, was not repealed in the revision of the statutes in 1830. And the court of chancery is bound to act upon it, whenever a proper case is presented.

In granting a decree for a separation, under the act of 1824, in favor of the husband against the wife, the court has no power to direct the husband to pay to his wife an allowance for her support.

THE bill in this cause was filed by the husband against his wife, to obtain a separation from bed and board, on account of cruel treatment, and such conduct on the part of the wife towards her husband as to render it unsafe and improper for him to cohabit with her. The defendant allowed the bill to be taken as confessed for want of an answer. And the case was heard upon the bill and upon the master's report of the facts. [*See ante*, p. 285, S. C.)

J. B. Scoles, for the complainant.

THE CHANCELLOR. In another case between parties of the same name, (*Perry v. Perry*, 2 *Paige's Rep.* 501,) I satisfied myself that the section of the act of April, 1824, giving the husband a right to file a bill in such a case, was not repealed in the revision of the statutes; and that I was bound to act upon it, whenever a proper case was presented. And upon a careful

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examination of the testimony, this complainant appears to have made out such a case. The evidence shows that the defendant frequently gives way to the most ungoverned passions, inflicting personal injury not only upon the complainant's grown up children, but upon her own; in some instances endangering their lives. The testimony also shows that she has committed personal violence upon the complainant himself, and frequently wished him dead; so as to render it wholly improbable that he can, by any discreet exercise of his marital power, keep her within such control that his health at least will not be endangered, so long as he continues to live with her. The evidence of her violence and brutality towards other members of her family would not of itself entitle the complainant to a decree of separation. But as I had occasion to say when this case was before me, upon exceptions to the complainant's bill, for impertinence, (1 *Barb. Ch. Rep.* 516,) the establishment of these charges in the bill, in addition to acts of personal violence and misconduct towards himself, are sufficient to satisfy me that it is unsafe for the complainant to continue to live with and cohabit with the defendant.

The complainant therefore is entitled to a decree of separation from bed and board forever; unless the parties shall hereafter mutually agree to live together, and shall apply and have the decree modified accordingly. Although I am compelled to decree a separation in this case, I should not leave the future support of the wife, beyond what she is able to earn by her own exertions, wholly unprovided for, but should direct the husband to pay the same amount for her support, which he has heretofore voluntarily paid, did I not doubt my power to make such a decree against the husband. The section of the act of 1824, under which this suit is instituted, (*Laws of 1824*, p. 249, § 12,) merely provides that it shall and may be lawful for the court of chancery to extend the same rights, to husbands, that are given to femes covert, by the 10th and 11th sections of the act concerning divorces and for other purposes. And it can hardly be said to be extending a right, to him, to make a compulsory order that he shall pay to his wife an allowance for

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support; after he has obtained a decree of separation from her, on account of her misconduct. I can therefore only recommend to him that he should hereafter allow her at the rate of three dollars a week, if he has the means of doing so, in addition to what she can earn by her own exertions; while she continues to provide for herself therewith, without being a charge upon any of her relatives or friends.

BOOTH vs. ALBERTSON and TERRY.

Where a suit at law is brought against the husband and wife, for the purpose of affecting her interest, she is a necessary party to a bill in chancery, by the husband, for an injunction to restrain proceedings in the suit at law.

THIS case came before the chancellor upon an application to dissolve an injunction. A suit at law had been brought against the complainant and his wife, for the purpose of affecting her interest in the subject matter of such suit. The complainant thereupon filed the bill in this cause, in his own name, and without making his wife a party; and thereupon obtained an injunction restraining the defendants from proceeding in their suit at law.

O. L. Barbour, for the complainant.

J. Rhoades, for the defendants.

The CHANCELLOR decided that the wife of the complainant was a necessary party to a suit, in this court, to restrain the plaintiff, in the action at law, from proceeding against the husband and wife in that suit.

Motion granted.

CARPENTER vs. SCHERMERHORN and others.

Where a person having an interest in real estate is under a disability during her lifetime, by reason of coverture, which prevents her from bringing an ejectment, her heirs must bring their suit within ten years after her death.

If one of such heirs is also a feme covert at the death of her mother, that circumstance will not have the effect to extend the period within which ejectment must be brought. For the law does not allow successive disabilities in different persons, taking the same estate by devise or descent from each other.

Where a testator devised to each of his six children an equal undivided sixth part of his real estate for life, and after the decease of each child devised the same to the children of such child and to their heirs and assigns forever; *Held*, that the devise in remainder was not to such of the testator's grandchildren as should survive their parents, but that one-sixth of the estate in remainder was given to all the children of each child of the testator, as to a class; that each grandchild, the moment it came into existence, took a vested interest in the remainder, in fee, subject to open and let in after-born children; and that such of them as died leaving issue, transmitted that interest by descent to his or her issue, even in the lifetime of the tenant for life, as a vested remainder in fee. But that the parent from whose side the estate came was the heir at law of such of the grandchildren of the testator as had died without issue, after the death of the testator, and in the lifetime of such parent.

A voluntary partition, of the interests of several persons in lands, without warranty, will, as between such persons, only give to each one the rights and interest, either vested or contingent, which he and the others then have in the lands set off severally.

And a further interest in the land set off to others, which one of the parties afterwards acquires as the heir at law of some of his children who had a remainder in fee in the premises, not being either a vested or a contingent interest in him, at the time of the partition, but a mere chance of his succeeding to the same, as an heir at law of his children, does not enure to the benefit of the other parties to the partition in respect to the lands set off to them.

The provision of the statute, requiring suits by heirs or devisees, for the recovery of land, to be brought within ten years, applies where the person originally entitled to sue is under a disability when the right accrues, and dies before such disability terminates, and thus casts the same estate, by devise or descent, upon heirs or devisees; in which case the heirs or devisees must bring their suit within ten years after the right of action accrued to them.

The shares of infant defendants, in the proceeds of the sale of premises in a partition suit, ought not to be paid to their guardians ad litem; but should be brought into court, and invested, for the benefit of such infants.

A feme covert, not being bound by a covenant of warranty, contained in a deed executed by her and her husband, jointly, for the purpose of conveying land which the husband holds in right of his wife, such covenant will not operate by way of estoppel, so as to vest an interest subsequently acquired by her, in the grantee in the deed.

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Where the master's report, in a partition suit, shows the actual interests of the several parties in the premises, it is not necessary to send the report back to the master to correct an erroneous estimate which he has made in relation to such interests; but the error may be corrected by the decree.

Where several tenants in common of mere life estates in the premises held in common, made a partition, of such premises, by parol, and one of them afterwards conveyed the lots set off to him, in such partition, in fee, with warranty, and subsequent to such conveyance acquired an undivided interest in the remainder in fee in the whole premises; *Held*, that his grantees of the part of the premises so set off in severalty, were not entitled to the undivided share which their grantor had thus acquired in those portions of the premises not embraced in their deed from him.

THIS case came before the chancellor upon the master's report, and amended report, in relation to the rights of the several parties in a partition suit. The premises, of which partition was sought, consisted of about one hundred and sixty acres of land in the town of Charlton, in the county of Saratoga, of which Ryer Schermerhorn was seised at the time of his death, and of lots Nos. 64 and 65 in Glen's patent, of which he was also seised at that time. Ryer Schermerhorn died in 1793, leaving six children, John, Rykert, Bartholomew, Jeremiah, Garret, and Engletje the wife of Nicholas Schermerhorn, his only heirs at law. By his will, made in due form of law to pass real estate, he devised to each of his said children an equal undivided sixth part of the premises in question, for life, and after the decease of his children respectively he gave one-sixth part of the said premises to the children of his son John, and one-sixth to the children of each of his other five children and to their heirs and assigns forever. Immediately after the death of the testator, his children caused the lands in Charlton to be divided into six lots, described in exhibit A. annexed to the master's report, as lots numbers 1, 2, 3, 4, 5 and 6, and took possession thereof in severalty, except that Rykert Schermerhorn took possession of two of the said lots, and his brother Jeremiah took possession of no part of the Charlton lands. Lots Nos. 64 and 65 in Glen's patent were then wild and uncultivated, and remained so at the date of the master's report.

In that parol partition of the Charlton lands, lot number one was allotted to and taken possession of by John Schermerhorn

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in severalty and previous to 1795 he conveyed the same in fee, with warranty, to John Campbell. And Campbell, and those who subsequently derived title under and through him, continued to possess and claim title to the whole of the said lot down to the time of the commencement of this suit; at which time W. L. Taylor was in possession of the said lot by virtue of divers mesne conveyances from and under Campbell. Lot No. 2, in that partition, was allotted to Rykert Schermerhorn; who in June, 1795, conveyed the same in fee to Jesse Conde, with warranty. And Conde, and those claiming under him, had also continued to possess and claim title to the same, under that conveyance, down to the time of the commencement of this suit; at which time Sarah Conde was in possession of a part of the said lot No. 2. And N. B. Jennies was then in possession of the residue thereof, by virtue of divers mesne conveyances from Jesse Conde. Lot No. 3, in that partition, was allotted to Bartholomew Schermerhorn, who in December, 1796, conveyed the same in fee, with warranty, to John Campbell. And Campbell, and those claiming under him, had also continued to possess and claim title to the same under that conveyance, down to the time of the commencement of this suit; at which time G. Matthews was in possession of the said lot, by virtue of divers mesne conveyances from and under Campbell. Lot No. 4, in that partition, was allotted to Garret Schermerhorn, and lot No. 5 to Engletje Schermerhorn; and they, together with the husband of Engletje, joined in a conveyance of both of those lots, in fee, to Melville Brown, with warranty. And Brown, and those claiming under him, had continued to possess and claim title to the same, under that conveyance, down to the time of the commencement of this suit; at which time G. Matthews was in possession of a part of one of the said lots, and J. Valentine and P. Hudson were in possession of different parcels of the residue of that lot, and of the other of the said two lots, by divers mesne conveyances from and under M. Brown.

In that partition, lot No. 6 was also allotted to Rykert Schermerhorn, who died about thirty-five years previous to the master's report, leaving two daughters who were then married

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And before his death he and his two daughters, together with their husbands. conveyed the said lot in fee, with warranty, to J. R. Maxwell And Maxwell and those claiming under him had continued to possess and claim the title to the same, under that conveyance, down to the time of the commencement of this suit ; and at the date of the master's report, G. Gould was in possession of that lot by virtue of divers mesne conveyances from and under Maxwell.

John Schermerhorn, one of the sons of the testator, died about forty years before the date of the master's report, intestate and without issue. And the master decided and reported, that in consequence thereof, one-sixth of the remainder in fee in the premises of which partition was sought was undisposed of by the will, and descended to the six children of the testator, at the time of the death of the latter ; and that the respective grantees of the six lots in Charlton, and those claiming under them, were entitled to hold that sixth of those several lots by adverse possession. Bartholomew Schermerhorn, another son of the testator, died in July, 1845, leaving eight children, and four grandchildren, the descendants of a deceased child ; all of whom together became entitled, under the will of the testator, to the remainder in fee in one-sixth of the whole premises of which partition was sought ; and that they were entitled to one-fifth of one-sixth of the two lots in Glen's patent, as heirs at law of Bartholomew Schermerhorn.

Jeremiah Schermerhorn, another son of the testator, died about 1836, leaving seven children, each of whom was entitled to one-seventh of one-sixth of the premises of which partition was sought, under the will of the testator ; and to one-seventh of one-fifth of one-sixth of the two lots in Glen's patent, as heirs at law of their father. And Ryer J., one of those children, afterwards conveyed all his interest in the premises to W. Fuller. Maria and Helen, two others of the children, conveyed their interest in lots No. 1 and 2 in Charlton to the defendant Jennie ; and Helen also conveyed to Hudson her interest in lot No. 5 in Charlton.

Engletje, the daughter of the testator, died in 1834, leaving

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her daughter Elizabeth Carpenter, the complainant in this suit, and three other children; each of whom was entitled to one-fourth of one-sixth of all the premises of which partition was sought, as devisees under the will of their grandfather, and to one-fourth of one-fifth of one-sixth of the two lots in Glen's patent, as heirs at law of their mother. James N. and Mary Sager, two of those children, conveyed all their interests in the premises of which partition was sought, to H. Carpenter, the former husband of the complainant. Carpenter died in 1838 leaving six children, one of whom conveyed all his interest in the premises to the complainant; but as their father had not paid his purchase money to James N. Schermerhorn, the latter had a lien upon the interest which he conveyed to Carpenter, for such unpaid purchase money. Lawrence Schermerhorn, another of the children of Engletje, conveyed all his interest in the premises to D. Smith.

Rykert Schermerhorn, another of the children of the testator, died about thirty-five years previous to the master's report, leaving two daughters, Helena, wife of Nicholas Clute, and Mary, wife of Dow Clute; each of whom was entitled to one-half of one-sixth of all the premises of which partition was sought, except in lot No. 6 in Charlton, which they had conveyed to Maxwell, as devisees under the will of their grandfather, and also to one-half of one-fifth of one-sixth of the two lots in Glen's patent, as the heirs at law of their father. Helena and Nicholas Clute subsequently died, leaving nine children who were her heirs at law and entitled to so much of her interest in the premises as she had not parted with in her lifetime.

Garret Schermerhorn, the other son of the testator, was living at the date of the master's report. He had nine children; two of whom had died without issue, after the testator, leaving their father their only heir at law. John Schermerhorn, another of the children of Garret, had also died leaving two children his only heirs. Maria, another of the children of Garret, had conveyed her interest in the premises to S. A. Daggett and M. Putnam. Jacob G., another of the children of Garret, had conveyed all his interest in the premises to S. A. Daggett. And Aaron G.,

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another of the children, conveyed all his interest in the premises to D. Buttolph ; which interest, at the date of the master's report, was vested in the defendant John Fuller. The master also reported that there were some specific and other liens upon the shares of several of the parties in the premises. He likewise reported that the several parcels of the premises were so situated that the same could not be partitioned, and that a sale was necessary. The case was submitted for a final decree upon the pleadings and master's report.

S. A. Daggett, for the complainant.

H. V. D. Van Epps, for defendant G. Gould.

THE CHANCELLOR. The master has clearly mistaken the rights of the children of Garret Schermerhorn, and of those claiming under them, in relation both to the Charlton lands and to the two lots of land in Glen's patent. He is right in supposing that the present owners of the Charlton lands are entitled to hold, by adverse possession, the one-sixth of their several lots, which was undisposed of by the will of the testator in consequence of the death of his son John without issue. For, upon the death of John, forty years since, the remainder in fee in that one-sixth, became vested in his four surviving brothers and his sister, who had an immediate right to bring ejectments for the recovery of the same ; except so far as the persons in possession were entitled to protection under their respective covenants of warranty, which gave to them a portion of the fee by way of estoppel. Although Engletje may have been married at that time, so as to protect her interest from being barred during the coverture, she died as early as 1834, and the lands were held adversely more than ten years after the descent to her heirs. And the statute requires the heirs of the person as to whom a disability has existed, to bring their suit within ten years after the death of such person. (1 *R. L. of 1813*, p. 185, § 3.) It is true, the complainant, and perhaps the other daughter of Engletje, may have been *femes covert* at the death of their

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mother, in 1834. But the law does not allow successive disabilities in different persons taking the same estate by devise or descent from each other. (*Doe v. Jesson*, 6 *East*, 80. 2 *Preston on Abs.* 341.)

The master appears to have proceeded upon the presumption that the surviving children of Garret Schermerhorn, were heirs to those who died without issue in the lifetime of their father. The devise of the remainder in this case, however, is not to such of the testator's grandchildren as shall survive their parents; but one-sixth of the estate in remainder is given to all the children of each child of the testator as a class. Each grandchild, therefore, the moment it came into existence, took a vested interest in the remainder in fee; subject to open and set in after-born children. And such of them as died leaving issue, transmitted that interest by descent to his or her issue, even in the lifetime of the tenant for life, as a vested remainder in fee. The parent from whose side the estate came, however, was the heir at law of such of the grandchildren of the testator as had died without issue in the lifetime of such parent. In relation to five of the children of the testator, it does not appear that they had any children who died without issue in the lifetime of their parents. The master has therefore properly considered those who survived their parents, or who died leaving issue, as entitled to the whole estate. But in relation to Garret, who is still living, and who is probably so far advanced in life that he can have no other children, it distinctly appears that he had two children who arrived to full age, and afterwards died without issue. And as they did not convey their interest in the one-sixth of the remainder in fee to any one, during their lives, it descended to their father, as their heir at law, under our statute of descents. Garret Schermerhorn, therefore, upon the death of those two children, became seised of two-ninths of one-sixth of the remainder in fee in the whole premises, as the heir at law of those two children. And as he had conveyed lot number four which was allotted to him, and also lot number five, allotted to his sister Engletje, with warranty, his interest in fee in two-ninths of one sixth of those two lots in Charlton passed, by es-

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toppel, to those who have derived title to the different portions of those two lots under that conveyance. He is also entitled to the remainder in fee in two-ninths of one-sixth of each of the other four Charlton lots, and to the two lots in Glen's patent, as the heir at law of those two children; and to the fee in one-fifth of one-sixth of the two last mentioned lots, as one of the heirs at law of his brother John. And he is entitled to a life estate in seven-ninths of one-sixth of the two last mentioned lots, the remainder in fee in which seven-ninths of one-sixth, subject to such life estate alone, belongs to his other children, or those who have acquired their interests therein. His life estate also continues in seven-ninths of one-sixth of the four lots in Charlton not embraced in his deed to Melville Brown. But by virtue of the parol partition, and the subsequent adverse possession of those four lots, the persons who derived title to the same under the conveyances from his brothers are entitled to the whole of his life estate in their respective lots. It must be ascertained and paid to them accordingly, in the distribution of the proceeds of those several lots. And the other seven children of Garret, or those who now represent their interests in the premises of which partition is sought, instead of being entitled to the share stated in the master's report, are only entitled, under the will of the testator, to seven-ninths of one-sixth of the several lots of which partition is sought, including the two lots in Glen's patent. Those interests are also subject to the life estate which Garret Schermerhorn still has therein, under the will of his father.

As the rights of these several parties appear upon the face of the master's report, it is not necessary to send that report back to the master to correct the erroneous estimate which he has made of their several interests in the premises, but that part of the report may be corrected in the decree.

The counsel for Gould insists that Garret Schermerhorn's two-ninths of one-sixth of the reversion, in the four Charlton lots which were allotted to his brothers in the parol partition, belong to those who have derived title to those lots under the conveyances in fee from those brothers. This would be so if

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Garret Schermerhorn had been the owner of either a vested or a contingent interest in that two-ninths of one-sixth of those lots at the time of the parol partition; or if he had conveyed the one-sixth of those lots to his brothers with warranty; or if it appeared that it was an interest which had been cast upon him by descent more than twenty years since, so that his right to the same was barred by the statute of limitations. But a mere parol partition of the interests of the children of the testator in the Charlton lands, could only, as between those children, give to each the rights and interest which the others then had in the lands set off in severalty, either vested or contingent. And, at the time of that partition, the interest which Garret has subsequently acquired, as the heir at law of two of his children, was not a vested or contingent interest in him; but the chance of his succeeding to the same, as the heir at law of his children, was a mere possibility, unaccompanied by any interest whatever in the premises. Again; there does not appear to be any equity in favor of those who have derived title to those lots under his brothers, as against him. As he acquired no interest whatever in the remainders in fee in his own lot, by that parol partition, as against the remaindermen to whom such remainders were devised, he is bound at law, as well as in equity, to protect the grantee of his own lot, and those claiming under that grantee, against the claim of those remaindermen. And if any persons had an equitable lien upon his two-ninths of one-sixth of the four lots in Charlton allotted to his brothers, it would be those who have become entitled to the other two lots under his conveyance with warranty. I do not see, however, that his conveyance of two lots, with warranty, gave, even to his grantee, an equitable lien upon the title which he afterwards acquired in the other four lots as heir at law of two of his children. Their claims are against him personally, under his covenant of warranty. The decree must, therefore, declare that he is entitled to two-ninths of one-sixth of the remainder in fee in each of those four lots, subject to an estate for his life in those two-ninths; which estate for life belongs to those who have derived title to the several portions of those four lots

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under the conveyances from his brothers, John, Bartholomew and Rykert.

The counsel for Gould also claims that the grantees of the Charlton lots, under the conveyances from the testator's children, are entitled to the interest of the children of Engletje in the Charlton lands, upon the ground that their claims are barred by the statute of limitations; they not having been made within ten years after the death of their mother. He has, however, entirely mistaken the law on the subject; for the limitation, as to them, is a limitation of twenty years, and not of ten. The ten years' limitation applies where the person entitled to sue for the recovery of lands is under a disability when the right accrues, and dies before such disability terminates, and thus casts the same estate, by devise or descent, upon heirs or devisees; in which case the heirs or devisees must bring their suit within ten years after the right of action accrued to them. But in this case, the children and descendants of Engletje do not claim title to the premises in question as the heirs at law of their mother. They are claiming a separate and distinct estate from hers, as the devisees of her father. And as a right in possession, to the estate in remainder, did not accrue to them until the death of their mother, in 1834, each of them had a right to bring his or her suit within twenty years from that time.

The interests of the several parties do not appear to be the same in either of the seven parcels of the Charlton lands described in exhibit B. annexed to the master's report. And the interests of the parties in the two lots in Glen's patent are also different from those in either of the seven parcels described in that exhibit. The decree must therefore describe the interest of each party in these several eight parcels of land, the two lots in Glen's patent being considered as one parcel, and stating the general and specific liens or incumbrances on the interest of any of the parties in all or any of such parcels. Each of the eight parcels must then be sold separately; subject to such taxes and assessments as may have been imposed thereon—each lot in Glen's patent being sold by itself. The costs of all parties entitled to costs, including the master's fees and expenses of the sale, must then

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be charged upon the proceeds of the eight parcels in proportion to the amount of the proceeds of each parcel. The master must then calculate the value of the life estate of Garret Schermerhorn in the one-sixth of the residue or net proceeds of each parcel of the Charlton lands, and pay the same to those who are now entitled to his life estate in the several parcels of such Charlton lands; deducting the same from the respective shares of his children, or their representatives, whose interests are subject to such life estate. And the value of his life estate in the net proceeds of seven-ninths of one-sixth of the two Glen's patent lots must also be computed, upon the principle of life annuities, and paid to himself; the same being deducted from the shares of his children, or their representatives, whose interests in those lots are subject to his life estate therein.

The shares of the proceeds belonging to the infant defendants are not to be paid to their guardians ad litem, as provided for in the draft of the decree presented; but they must be brought into court by the master, and paid to the clerk of the court of appeals, to be invested for their benefit.

The equitable lien of James N. Schermerhorn, for the purchase money, is not upon the whole of the share of which H. Carpenter died seised, but only upon the half of that share which belonged to James N. at the time of the execution of the conveyance from him and his sister for both of their shares. The amount due him for such purchase money must, therefore, be paid him out of the net proceeds of the half of the share of the premises of which H. Carpenter died seised, after deducting the costs and expenses properly chargeable thereon. And the rights of the parties must be declared, and provided for accordingly, in the decree. The dower of the complainant, in the net proceeds of the half of the share of which her husband died seised must be computed only upon the balance of such proceeds after deducting the amount of such equitable lien. For her dower interest, as well as the interests of her children in that part of the premises which came to H. Carpenter from James N. Schermerhorn, is subject, to the equitable lien of the latter for his unpaid purchase money

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As the taxes and assessments upon the several pieces of land must necessarily be different, and there are probably none upon the Charlton lands, which have been actually occupied and claimed in fee for nearly fifty years, the parties who are interested in those lands alone ought not to be subjected to the expense of ascertaining and paying the taxes on the lands in Glen's patent, in which lands they have no interest. I have, therefore, directed that each piece of land shall be sold subject to the lien of any tax or assessment which may be found to be chargeable thereon. And as the interests of many of the parties in the proceeds will be very minute, it would subject them to unnecessary expense hereafter to obtain their shares of such proceeds if the premises were sold on credit, and the securities taken on such sales brought into court for future distribution. The decree must, therefore, direct the several parcels to be sold for cash; so that the proceeds thereof may be apportioned and distributed by the master, without further expense.

The defendant Garret Schermerhorn, by virtue of his covenants in the deed to Melville Brown, is liable to the several persons who have derived title under Brown, for the loss of such portions of their several lots as by this partition suit are ascertained to belong to others, as well as for their shares of the costs to which they have been subjected by this suit. And the children of Bartholomew and Rykert Schermerhorn, as the heirs at law of their respective parents, having taken an interest by descent in the two lots in Glen's patent, in addition to their interests therein under the will of their grandfather, they are, as such heirs at law, liable upon the covenants of warranty in the deeds of their respective parents, and of their uncle John, to the extent of the interests which have come to them by descent. Even the children of Jeremiah and of Engletje, although the former gave no covenant of warranty, and the latter, being a feme covert, was not bound by her covenant, are still liable, to a certain extent, under the covenant of warranty of their uncle John. For they have taken by descent from their parents, interests in the two lots in Glen's patent, which interests came to their

In the matter of Heeney.

parents as heirs at law of John Schermerhorn. The children of Engletje, although she was not bound by her covenant in the deed to Brown, may also be liable upon the covenants of their father, in the same deed, if they took any real estate by devise or descent from him. To protect the future rights of the parties claiming under or through such covenants, therefore, the decree must contain a provision that it is to be without prejudice to the rights of any of the parties in this suit, as against any of the other parties, or as against any other person, by reason or on account of any breach of warranty in any deed or conveyance of the premises of which partition is made in this suit, or of any part or parcel thereof.

In the matter of HEENEY, a lunatic.

[Distinguished, 23 Hun 641, 642.]

The court of chancery has the power, out of the surplus income of the estate of a lunatic, to provide for the support of persons not his next of kin, and whom the lunatic is under no legal obligation to support; where it satisfactorily appears to the chancellor that the lunatic himself would have provided for the support of such persons, had he been of sound mind.

The court may also make an allowance, out of the income of a lunatic's estate, for the education of persons whom he had adopted as children, while he was in a sound state of mind.

And the committee of the lunatic may be authorized to provide for the keeping up of the lunatic's family establishment, with the same number of domestics as had been customary previous to the lunacy, and to expend for that purpose, annually, an amount not exceeding that which had been annually expended by the lunatic himself before his lunacy.

The committee may also be authorized, by the court, to place at the lunatic's disposal so long as he is competent to judge of the claims of applicants, small sums of money for purposes of charity.

And the court may also authorize the committee to pay for the support of the institutions of religion, in the church where the lunatic and his family have been accustomed to worship, such sums from time to time as the lunatic may desire him to pay for that purpose, not exceeding the amount which the lunatic had been in the habit of paying annually, before his faculties became impaired.

But the committee will not be allowed personally to expend any part of the estate of the

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lunatic for general charity, or objects of benevolence, or of piety, for which the lunatic himself had not been in the habit of contributing specifically and regularly, while he was competent to manage his own affairs.

THIS was an application by the committee of Cornelius Heeney, who in consequence of old age and infirmity had been found to be of unsound mind, for instructions in certain particulars relating to the support of the lunatic and the support of his household, and the management of his estate.

From the petition of the committee, among other things stated therein, the following facts appeared: The annual income of the estate, after payment for repairs, insurance and taxes, amounted to about \$5700. Mr. Heeney was a bachelor, but had been a housekeeper for many years, living upon a part of his own property; and the expenses of his establishment, for about thirteen years before the issuing of the commission against him, had been about \$2000 per annum. In addition to this expenditure, which included the board and clothing of two young ladies whom he had adopted, he had sent those young ladies to a boarding school, and had paid the expenses of their education. One of them had finished her education and returned to his house as her home, and the other still remained at school to complete her education. He had formerly had three sisters for whose support he provided. And one of them, who was still living, he had supported for the last forty years; allowing her \$250 a year, payable quarterly, in addition to her clothing and physician's bills, and occasionally making her further allowances when her necessities required them. He had also for several years maintained three aged ladies, whom he had sent for to Europe in their younger days, and supported in his house until they were married, and after the deaths of their husbands he paid about \$100 a year for the rent of a house for them, and allowed them the further sum of \$4 a week for their other expenses. And he continued such support down to the time when he was found to be of unsound mind so as to be incapable of managing his own affairs. He was also in the habit of spending the whole of the residue of his income in acts of benevolence and charity and piety. There were two notes of which he was

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the drawer, and three on which he was the endorser, outstanding and unpaid. The committee stated upon his own knowledge, that the two notes of which Heeney was drawer, were given to raise money for himself, which was applied to the payment of assessments on his property. One of the notes endorsed by him was supposed to have been given to pay for the education of the two young ladies adopted by and living with him; and the other two did not appear to have been endorsed by him for his own benefit, or for any valuable consideration. All these notes and endorsements were overreached by the inquisition. Several suits were pending against Mr. Heeney at the time of finding the inquisition, and one suit in his favor; and he was also threatened with suits upon the endorsements; as to all of which suits and matters the committee stated the facts so far as he had been able to ascertain them, and asked the direction of the court.

O. L. Barbour, for the petitioner.

THE CHANCELLOR. In the case of the late Dr. Willoughby, after a full examination of the subject, I came to the conclusion that the court of chancery had the power, out of the surplus income of the estate of a lunatic, to provide for the support of one who was not his next of kin, and whom the lunatic was under no legal obligation to support, where the chancellor was satisfied, beyond all reasonable doubt, that the lunatic himself would have provided for the support of such person if he had been of sound mind, so as to be legally competent to do so. The case of *The Earl of Carysfort*, (*Craig & Phil. Rep.* 76,) is a strong case in favor of the jurisdiction of the court of chancery to direct such a provision to be made. For in that case the lord chancellor allowed a retiring pension, out of the income of the estate of the lunatic earl, to an old personal servant; merely because he was satisfied that the earl himself would have approved of such an allowance if the loss of his reason had not deprived him of the power to act for himself.

In the case under consideration, the lunatic, when in the full possession of all his faculties, placed himself in the situation of

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a father to the two young ladies mentioned in the petition, and supported them as members of his family and sent them to a boarding school; where one of them completed her education and has again returned and become a member of his family, leaving the other still at school. I have no doubt, therefore, that if Mr. Heeney had retained the full possession of his faculties he would have continued to support them in the same way while they remained unmarried. I shall therefore but carry out his undoubted intentions, by directing the committee to let these two young ladies remain in the family and be supported as they have heretofore been, until their marriage, or the death of the lunatic, or the further order of the court. The committee must also continue the one who has not yet finished her education, at the boarding school for the same length of time that her sister was continued there by the lunatic, and pay the same allowance for her education, &c., out of the income of the lunatic's estate. And generally, the committee is to provide for the keeping up of the lunatic's family establishment, with the same number of domestics, for his comfort and convenience, that he has heretofore employed before his lunacy, and to expend for that purpose such sums as may be necessary, not exceeding the annual amount of \$2000, mentioned in the petition. And if increasing infirmity should require a greater expenditure for the comfort and support of Mr. Heeney and his family, the committee is to be at liberty to apply for a further allowance for that purpose.

I cannot authorize the committee to be the almoner of the general charities of the lunatic; but so long as Mr. Heeney himself is competent to judge as to the probable claims of those who may call upon him for small donations, for temporary relief from want and suffering, the committee is to place at his disposal, in small sums, an amount not exceeding \$100 per annum, to be disposed of for that purpose in such way as Mr. Heeney may deem fit. The committee is also authorized and directed to allow and pay to the surviving sister of the lunatic the annuity of \$250, in quarterly payments, which she has heretofore been accustomed to receive from her brother, out of the income of his estate; and to pay her physician's bills and

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such other occasional sums as her brother has been in the habit of giving her from time to time, not exceeding \$150 per annum.

It also appears to be proper that the committee should be directed to allow to the three aged ladies, whose family name was Fullard, who have been so long sustained by the lunatic's bounty, the same allowance which Mr. Heeney was in the habit of making to them, respectively, as fixed allowances; and that he should be directed to pay the arrears of such allowances for the time they have been suspended by the incapacity of the lunatic. The committee is also to be authorized to pay for the support of the institutions of religion, in the church where Mr. Heeney and his family were accustomed to worship at the time his mental faculties became impaired, such sums, from time to time, as Mr. Heeney may desire him to pay, not exceeding the amount which the lunatic had been accustomed to pay annually for the two or three years immediately preceding the time from which he is found by the inquisition to have been of unsound mind; not exceeding the annual sum of \$100.

The committee is to be directed to pay the note stated to have been endorsed by Mr. Heeney to pay the board and tuition of the two young ladies brought up in his family. And the payment of the note given for the assessments, upon the lunatic's property, is sanctioned by the court. But the two notes endorsed by the lunatic for Michael Dunn, and which endorsements are overreached by the finding of the jury, are not to be paid by the committee without further order. But the holders of such notes are to be left to apply to the supreme court, in equity, for the payment of such notes by the committee, upon due notice of the application to him, if they cannot be collected from the maker of such notes; provided such holders can show that in equity the lunatic's estate should be charged with the payment thereof.

The committee is also to be authorized to compromise the suit of James Heaney and William Heaney, mentioned in the petition in this matter, on such terms as he may deem reasonable. And he is directed to pay the amount of the verdict and costs in the suit brought by Thomas Billsland, without further

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litigation. But the chancery suit brought by Mr. Heeney against Michael Dunn, the committee is directed to prosecute until he shall become satisfied that there is no probability of his being able to bring the same to a successful termination, or until the defendant therein shall offer such terms of compromise as the committee shall deem it for the interest of the lunatic's estate to accept; in which case he is at liberty to compromise and settle the said suit, with the defendant therein.

The committee is also to be at liberty to advance such sums as may be necessary, out of his own funds, to meet payments which should be made immediately, and which the moneys of the lunatic; in his hands, are insufficient to pay; and to retain the amount of such advances, with the legal interest thereon, out of the future income of the estate, or out of the proceeds of the personal estate in his hands.

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By the common law, it is a good cause of challenge to a juror that he is of kin to either of the parties, by consanguinity or affinity, within the ninth degree.

Affinity properly means the tie which arises, from marriage, betwixt the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. And the blood relatives of the wife, while the marriage tie continues, stand in the same degree of affinity to the husband as they do in consanguinity to her.

Relationship by affinity may exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity.

But there is no affinity between the blood relatives of the husband and the blood relatives of the wife.

The death of the husband, without issue, will sever the tie of affinity between the wife and a third person, to whom she is related in consequence of the husband's relationship to him by consanguinity only. But if there be living issue of the marriage, who survive the husband, such issue will continue the relationship by affinity, between the wife and the blood relatives of her deceased husband.

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Although a judgment, rendered by a judge who is related to either of the parties in a suit, may not be absolutely void, where there was nothing before such judge to show the existence of the relationship, *it seems* the proper course for the judge, where he is satisfied of the fact of his relationship to either of the parties in interest in the suit, is to refuse to hear the cause; unless both parties, upon being informed of the fact, join in a request to him to hear and decide it.

The only exception to this principle is where the constitution has conferred the jurisdiction upon a particular judge, or tribunal, and no provision is made by law for hearing and deciding the matter in controversy in any other way, when such judge is related to either of the parties. In that case, the constitution being the paramount law, the judge, or tribunal, to whom the constitution has confided the decision of the matter, must from necessity, hear and decide it; to prevent a failure of justice.

THIS was an appeal, from an order of the late vice chancellor of the fifth circuit, denying the complainant's motion for the appointment of a receiver, upon a creditor's bill, on the ground that the vice chancellor was not authorized to hear and decide the motion. An application had been made to the chancellor, founded upon an affidavit that the defendant was the widow of a second cousin of the vice chancellor of the circuit in which this suit was pending. The chancellor thought there was not such a relationship existing between the defendant and the vice chancellor as to incapacitate the latter from hearing and deciding the motion; and therefore advised the counsel to renew his application there. An application was made accordingly, and upon the hearing thereof the vice chancellor stated it as a fact, within his own knowledge, and which was conceded by the complainant's counsel, that the former husband of the defendant was a cousin german, or first cousin, of the vice chancellor, and that she had a son by that husband who was then living. And the vice chancellor thereupon denied the application, upon the ground that he was not competent to hear and decide the motion for a receiver, by reason of his relationship by affinity to the defendant.

W. A. Beach, for the appellant.

O. L. Barbour, for the respondent.

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THE CHANCELLOR. By the common law, it is a good cause of challenge to a juror, that he is of kin to either of the parties, by consanguinity or affinity, within the ninth degree. (2 *Black. Com.* 363. *Cary's Law of Juries*, 89. *Finch's Law*, 401.) Affinity properly means the tie which arises from marriage betwixt the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. Consequently, while the marriage tie remains unbroken, the blood relatives of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her. Thus the father of the wife stands in the first degree of affinity to his son-in-law, as he does in the first degree of consanguinity to his daughter. Relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity. (*Charles v. John*, *Year Book*, 41 *Edw.* 3, p. 9. *Markham v. Lee*, cited 1 *Leon. Rep.* 89. *Foot v. Morgan*, 1 *Hill's Rep.* 654.) But there is no affinity between the blood relatives of the husband and the blood relatives of the wife. (*Toml. Law Dict. art. Affinity*. *Gibs. Codex*, 512. *Pothier, Traite du Marriage*, pt. 3, ch. 3, art. 2.) The defendant in this case, during the life of her husband, stood in the fourth degree of affinity to the vice chancellor of the fifth circuit, as her husband was related to him in the fourth degree of consanguinity. The death of her husband, however, would have severed this tie of affinity, entirely, had not the living issue of the marriage, in whose veins the blood of both parties was commingled, continued to preserve the relationship by affinity through the medium of such issue of the marriage. This distinction between the severance of the tie of affinity by the death of the husband, or wife, without issue, and the continuance of the tie between the blood relatives of the decedent and the survivor, through the medium of living issue of the marriage, appears to be distinctly recognized in the cases referred to by the vice chancellor where challenges have been made on the

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ground of such relationship. (*Coke Lit.* 156, a. *Idem*, 57, a *Mounson v. West*, 1 *Leon. Rep.* 88. *Cain v. Ingham*, 7 *Cowen's Rep.* 478. *Abbe of Stratford's case*, *Year Book*, 10 *Hen.* 7, p. 7. *Finch's Law*, 9. *Carman v. Newell*, 1 *Denio*, 25.)

It is not necessary to examine the question, in this case, whether the vice chancellor is related to the defendant in the fourth degree of affinity, as he was before the death of her husband, who was his cousin german, or only in the sixth degree, through the medium of her son; who is related to the vice chancellor in the fifth degree of consanguinity, as his second cousin. For, in either case, the relationship by affinity between the defendant and the vice chancellor is sufficiently near to exclude him from serving as a judge or juror in a cause in which she is interested as a party.

The language of the statute under which this question arises is, that "no judge of any court can sit as such in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." (2 *R. S.* 275, § 2.) And though the objection in this case was made by the party who was related to the vice chancellor by affinity, and not by the complainant, I think the vice chancellor was right in refusing to hear and decide the motion upon its merits; for the reason assigned by him in the order denying the application. Such appears to be the construction which has been put upon this statute by the supreme court. For in *Edwards v. Russell*, (21 *Wend. Rep.* 63,) Cowen, J. who delivered the opinion of that court, says: "The meaning of the statute, that the judge cannot sit in a case in which he is related to the parties is, not merely that the interests of the parties are unsafe, but the general interest of justice. Decency forbids that he should be seen acting either for or against his father, brother, or cousin," &c. And, although I am not prepared to say that the judgment rendered in such a case is absolutely void, where there was nothing before the judge, at the time he rendered such judgment, to show that the real party in interest in the suit was related to him either by affinity or consanguinity, as

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in the case of *Foot v. Morgan*, (1 *Hill's Rep.* 154,) still, I think the proper course for a judge, where he is satisfied of the fact of his relationship to either of the parties in interest in the suit, is to refuse to hear the cause; unless both parties in the suit, upon being informed of the fact, shall join in a request to him to hear and decide it.

The only exception to this principle is where the constitution has conferred the jurisdiction upon a particular judge, or tribunal, and no provision is made by law for hearing and deciding the matter in controversy when the judge is related to either of the parties in the suit. There, the constitution being the paramount law, the judge, or tribunal, to whom the constitution has confided the decision of the matter, must from the necessity of the case hear and decide it, to prevent a failure of justice. (*Matter of Leefe and wife, ante, p. 39.*)

No such necessity existed in the case under consideration; for the statute had authorized the chancellor to hear and decide an application, where the vice chancellor, before whom the suit was pending, was legally disqualified to act in the particular case. (2 *R. S.* 177, § 60, of 2d ed.) It is true such an application had been made to the chancellor, upon an affidavit that the defendant was the widow of a more distant relative of the vice chancellor than she now appears to be; and the chancellor, overlooking the fact that there was still an existing relationship, by affinity with the vice chancellor, within the ninth degree, through the medium of the surviving issue of her marriage with her deceased husband, refused to hear the application, upon the supposition that he was not authorized to hear it upon the case as then stated. Still, the decision of the vice chancellor was right, and the chancellor alone was then authorized to make the order asked for.

The order appealed from must therefore be affirmed; with liberty to the complainant to re-notice his application before the chancellor, or before the supreme court, at his election, upon the same papers which were before the vice chancellor; or to renew the application, upon new papers, before the supreme

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court, if he shall be so advised. And under the circumstances of this case the complainant ought not to be charged with costs upon this appeal.

Order accordingly

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In this state, no written articles are necessary to constitute a copartnership which is to take effect immediately; although a written agreement may be necessary to bind the parties to enter into a future copartnership which is not to commence until after the expiration of a year.

But even where there is a parol agreement to enter into a copartnership at a future day, and specifying the terms of such copartnership, *it seems* that if the parties go into copartnership at the prescribed time, without agreeing upon any new terms, the former parol agreement will be presumed to constitute the terms upon which such copartnership was entered into and carried on.

Real estate purchased with partnership funds, for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm, for the payment of its debts, and for the purpose of adjusting the equitable claims of the copartners as between themselves.

A copartnership which is entered into and commenced immediately is not invalid, although one of the declared objects of the copartnership is to purchase real estate for the purposes of the firm, and as a site for the transaction of its business.

THIS was an application to dissolve an injunction, upon the matter of the bill only. The object of the bill was to obtain an account and settlement of the concerns of a copartnership which had existed and been carried on between the complainant and the defendants; and to restrain one of the defendants, who was stated in the bill to have misapplied the funds, from selling, disposing of, or intermeddling with the copartnership effects. The bill stated that, by the copartnership agreement, which was by parol, the complainant and the defendants entered into a partnership which was to continue three years; the business of which was to purchase a water privilege and site for a

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foundry, in the village of Plattsburgh, and to erect an iron foundry or furnace thereon, and to carry on the business of manufacturing iron-castings, &c., and each of the copartners was to contribute a certain amount of funds to the capital of the firm; that the parties all contributed money to the capital, and a site was procured and a foundry erected thereon, by the copartners, but the title to the land on which the foundry was erected, was taken in the name of the defendants only; and that the foundry business was carried on by the firm until the latter part of August, 1846, when the foundry was sold and the copartnership dissolved, by mutual consent.

G. A. Simmons, for the complainant.

L. H. Nutting, for the defendants.

THE CHANCELLOR. The misapplication of the copartner ship funds, and other violations of duty in relation to the books, property and effects of the firm, by the defendant Finley, appear to make a proper case for the granting of an injunction against him. And I cannot see that there is any validity in either of the objections raised by the counsel of the defendants, to the parol agreement of copartnership.

This was not, as the counsel supposes, an agreement which was not to be performed within one year; so as to require it to be in writing, under the statute of frauds. But it was the formation of an immediate partnership between the parties, which partnership was to continue three years unless sooner dissolved by the consent of such parties. In this state no written articles are necessary to constitute a copartnership which is to take effect immediately; although a written agreement might be necessary to bind the parties to enter into a future copartnership to commence after the expiration of a year. But even where there was a parol agreement to enter into a partnership at a future day, and specifying the terms of such copartnership, I apprehend that if the parties went into copartnership at the

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prescribed time, without agreeing upon any new terms, the former parol agreement would be presumed to constitute the terms on which such partnership was entered into and carried on.

Nor is the objection well taken that this partnership was invalid because a part of the business of the firm was to purchase real estate as a site for the foundry, and to erect a building thereon for the purpose of making iron-castings, &c. The case of *Henderson v. Hudson*, (1 *Munf. Rep.* 510,) referred to by the defendant's counsel, was not a case of partnership, or of land purchased with partnership funds for the use of a copartnership firm. It was merely an attempt to create a trust, by parol, in lands purchased by an individual in his own name, and with his own funds. But real estate purchased with partnership funds for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm, for the payment of its debts, and for the purpose of adjusting the equitable claims of the copartners as between themselves. (*Buchan v. Sumner*, ante, p. 165.)

The motion to dissolve the injunction must therefore be denied with costs.

WILKES and others vs. HARPER and others:

[Affirmed, 1 N. Y. 586.]

It is well settled, as a general principle of equity, that where one person, or his property, stands in the situation of a surety for the payment of a debt, for which payment another person, or his property, is primarily liable, the one who is secondarily liable, upon his paying the debt to the original creditor, is entitled to be subrogated to all the rights and remedies of such creditor, as they then exist, against the principal debtor or his property.

And where the original creditor has even an equitable lien upon the property of the person who is primarily liable to him, such lien may be upheld and enforced, in favor of the substituted creditor, in preference to any subsequent lien or claim upon such property unless it be a legal lien or title acquired by a bona fide mortgagee, or

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purchaser, or pledgee, for a valuable consideration, and without notice of the prior equitable right.

In all cases, in respect to mere equitable liens, the maxim prevails, in the court of chancery, that he who is prior in time is stronger in right.

It is also a settled principle in the court of chancery, that the general lien of a judgment, upon the real estate of a debtor, is subject to all the equities which existed against such real estate, in favor of third persons, at the time of the recovery of such judgment. And a court of equity will so control the legal lien, of the judgment creditor, as to protect the rights of those who have prior equitable interests in, or liens on, such property, or the proceeds thereof.

Legatees, whose shares of the personal estate of the testator have been wasted by the executor, have no specific equitable lien therefor upon the real estate to which such executor is entitled as a devisee of the testator, to make good their loss. Nor are such legatees, on that account, entitled to a priority over the legal liens which other creditors of the executor have acquired, upon such real estate, by judgment. Neither will the receipt, by an executor, for the mere purpose of distribution, of the shares of devisees of the purchase money of real estate sold by him as their agent, give them a lien upon real estate devised to such executor.

THIS was an application, by the defendants, to dissolve an injunction, for want of equity in the bill to sustain it. The claim of the complainants was founded upon the will of Charles Wilkes, of the city of New-York, and on the frauds and misconduct of Horatio Wilkes, one of the executors and trustees, and also one of the residuary legatees and devisees of the testator. C. Wilkes, the testator, died in 1833, possessed of personal estate of the value of about \$250,000, and also of a very large real estate; a part of which real estate consisted of the house and lot No. 28 Laight-street in the city of New-York. He left his widow, Jane Wilkes, and six children—George, Hamilton, Horatio, Anne, Charlotte the wife of Lord Jeffrey of Edinburgh, and Frances the wife of C. D. Colden, surviving him; and he appointed his widow executrix, and his three sons executors of his will. By that will he bequeathed to his widow his house and lot No. 28 Laight-street for life, giving her the right to elect between that and another house and lot in the same street; and he also gave to her the use of his furniture, plate, pictures, and carriage and horses, during life. In addition to this, he gave to his executrix and executors \$50,000, in trust to invest the same, and to pay over the interest thereof to his widow for life; with power to her to dispose of \$30,000 of the capita

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thereof, at her death, by will ; and the other \$20,000 was then to sink into his residuary estate. And, after giving \$6000 in legacies to his nephews and niece, he disposed of the residue of his real and personal estate among his six children in equal shares ; the sons to take their shares absolutely and directly ; and the share of one of the daughters was vested in his executrix and executors to sell the same and pay the proceeds to her or her representatives. The shares of the other two daughters he devised and bequeathed to other persons, as trustees, to sell and convert the same into money, and invest the proceeds in permanent securities for the separate use of those two daughters respectively for life, with power to the daughters to dispose of the same by will ; and in default of such disposition, he gave the same to the heirs or assigns of such daughters forever.

The widow and all the sons proved the will of the testator and took out letters testamentary thereon ; but they permitted Horatio Wilkes, one of their number, to have the principal control and management of the funds of the estate. Out of the funds which came to his hands, he paid for debts due from and moneys held in trust by the testator, about \$130,000 ; and he set apart and invested \$50,000 for the legacy to the widow, in addition to the furniture, &c., specifically bequeathed to her. He also paid the legacies to the nephews and niece of the testator. Portions of the real estate had also been sold, either by the devisees, or by Horatio Wilkes as their agent, to the amount of about \$95,000 ; the proceeds of which sales, with the exception of \$26,000 received by his brother Hamilton, came into his hands for the convenience of distribution. And he also received about \$30,000, for the interest and income of the personal estate which had come to his hands as one of the executors, and for rents and profits of real estate which the devisees had suffered him to collect and receive, and for interest on the proceeds of real estate in his hands for distribution. Out of these proceeds of the real and personal estate, in December, 1835, Horatio Wilkes distributed between himself and his brother George and the trustees of his three sisters, about \$100,000, in equal proportions. And Hamilton Wilkes retained in his hands the

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\$26,000, on account of his share of his father's real and personal estate; leaving in the hands of Horatio Wilkes between fifty and sixty thousand dollars of the proceeds of the personal estate, and of the real estate which had been sold, as a fund to pay the residue of the debts of the testator, and for future distribution among those who were entitled to the same. This sum, with the exception of \$2400, as the complainants alleged in their bill, Horatio Wilkes wasted or appropriated to his own use previous to the recovery of the complainants' judgment against him, in January, 1837. He also wasted, or appropriated to his own use, about \$27,000 of the trust fund which he had previously set apart and invested for the legacy to his mother.

In January, 1837, the defendants in this suit recovered a judgment against Horatio Wilkes, and two other persons, in the superior court of the city of New-York, for \$2838, for a debt in no way connected with the estate of the testator; which judgment became a lien upon the legal title of Horatio Wilkes in one-sixth of the remainder in fee, of the house and lot No. 28 Laight-street, devised to him by the will of his father. In March, 1840, Horatio Wilkes died unmarried and intestate, leaving his mother, and his two brothers and three sisters, his only heirs at law. All his estate and property of every kind, with the exception of his interest in the Laight-street lot, had previous to that time been applied to the payment of his debts; leaving the judgment of the defendants in this suit, and the debts due from him on account of his father's estate unpaid. At the time of his death there also remained due from the estate of his father to Fanny Garnett and Harriet Garnett a debt of about \$12,500, for moneys received in trust by the testator during his lifetime, and invested by him in his own name; which fund came to the hands of the acting executor and was wasted by him previous to the recovery of the judgment of the defendants in this suit. In May, 1840, Hamilton Wilkes applied the \$2400 of the proceeds of the estate of his father, which had not been wasted by the acting executor, to the payment of a part of the debt of the Misses Garnett. And being advised that the surviving executors and executrix, and the residuary

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legatees and devisees, were liable to pay the balance of that debt, he paid it out of his own funds, upon his and their account, and with their assent.

The defendants in this suit afterwards sued out a scire facias, against one of the surviving judgment debtors, and against the assignee of the other, who had been discharged under the bankrupt act, and against the brothers and sisters and the mother of Horatio Wilkes, as his heirs at law, to revive their judgment and have execution thereon against the estate upon which it was a lien. The complainants, the widow and surviving children of Charles Wilkes, with the husbands and trustees of the daughters, thereupon filed their bill in this cause, stating these facts, and also stating that other claims existed against the estate of Charles Wilkes, the validity of which, however, they did not admit, and claiming the right to have the residuary real estate which was devised to Horatio by the will of his father, applied to pay the balance due to them and the amount which Hamilton Wilkes had paid for them to the Misses Garnett, and any other debts of the testator which they might be compelled to pay. They also prayed for an injunction to restrain the defendants from proceeding upon the scire facias to revive their judgment, and from commencing any other suit or proceeding to enforce the lien of their judgment against the interest which Horatio Wilkes had, under the will of his father, in the house and lot No. 28 Laight-street. And the injunction was issued accordingly, upon the certificate of one of the vice chancellors, acting as an injunction master.

S. A. Foot, for defendants. The only questions for the chancellor's decision in this case, are 1. Is there sufficient, on the face of the bill, to authorize the granting of the injunction? 2. If there is, should not the injunction be modified so as to permit the defendants in this suit to proceed to judgment on their scire facias?

The complainants claim, that they have an equitable lien on Horatio Wilkes' undivided sixth part in the house and lot No. 28 Laight-street, superior to the lien of the defendants by vir-

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tue of their judgment; and they claim to have an injunction against the defendants to restrain them from enforcing their judgment, and especially to stop them from further proceedings on their scire facias issued to revive it. The bill contains no statement that there was not, at the death of the testator, and is not now, in the hands of his legatees, a sufficient amount of his personal property to meet and satisfy all just claims against his estate. Nor could any such statement be made with truth, for the contrary appears on the face of the bill. The bill also contains no statement that after due proceedings before the proper surrogate's court, or at law any creditor has been unable to collect his debt, or any part of it, from the personal representatives of the decedent, or his next of kin, or legatees.

This cause has already been fully discussed upon pleadings and proofs, and decided by the assistant vice chancellor on the same facts substantially which appear in the present bill. On that occasion the complainant's bill was dismissed with costs, but without prejudice; the assistant vice chancellor suggesting that the time of the devastavit by Horatio Wilkes might have some influence on the question between the parties.

We cannot conceive how the time of Horatio Wilkes' devastavit can have the least influence on the rights of the parties. In opening this motion to dissolve the injunction, we do not consider it necessary to do more than refer to the sections of the statute which apply to the subject, and to a case or two where like matters have been discussed and decided. (2 R. S. 2d ed. 369, §§ 32, 33, 34. *Id.* 371, §§ 48 to 56. *Id.* 372, §§ 57 to 60. *Morris and others v. Mowatt*, 1 Paige, 586. *Butts v. Genung*, 5 *Id.* 204. *Schermerhorn v. Barhydt*, 9 *Id.* 28.)

There appearing to be no equity on the face of the bill, we ask to have the injunction dissolved; but if the chancellor shall be of opinion that the bill does contain grounds of equity, then we ask to have the injunction modified so as to allow the defendants to proceed to judgment on their scire facias.

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W. M. Evarts, for the complainants. Upon the facts stated in the bill, we claim the following equities: *First*, that Horatio Wilkes' interest in the house in Laight-street, derived from his father's estate, should contribute to make good to Hamilton Wilkes one-sixth part of the debt of the estate paid by him. *Second*, that inasmuch as Horatio wasted the fund out of which this debt could and should have been paid, his interest in the house should be applied *in solido* to the payment of this debt, before the complainants should be called upon for contribution. *Third*, that Horatio's interest in the house is liable to the complainants, to make good the entire devastavit committed by him on the estate. *Fourth*, the same equities in respect of the claim in suit against the estate of Charles Wilkes, as in respect to the debt paid by Hamilton Wilkes to the Misses Garnett; and *Fifth*, that these equities are superior to the legal lien of the defendants' judgment.

If this bill had been filed against Horatio Wilkes in his lifetime, and its equities asserted against the Laight-street property in his hands, (no claims of creditors of Horatio intervening,) it is difficult to imagine any answer which it could lie in his mouth to make to the manifest justice of the complainants' claim. It would not be necessary for them to found their rights upon statutory proceedings, nor even to confirm them by the substituted rights which they acquire from having paid the debt of their common testator. They could have rested upon a simple equity, to have the portion of the estate of the testator, which the executor had wasted, treated as his distributive portion of the estate, and all that they could arrest from dissipation applied towards making good the shares of the estate to which they were respectively entitled. It would certainly be no injustice to Horatio, to consider the testator's property which he had converted to his own use, as taken by him as his distributive share under the will, and if his devastavit did not encroach upon the entire estate beyond his own interest in it, he would be relieved from the opprobrium of a breach of trust, and the other parties in interest from any loss from his acts. Suppose, in the case at bar, these complainants, getting information of Horatio's

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dealings with the estate, and of his pecuniary condition, just at the moment when the funds of the estate had been made way with to the full amount of his proportion of it, and having good grounds (such as a court of equity would acknowledge,) for *fearing* that if he continued in the administration of the estate; its funds would be exhausted for his individual purposes, to the detriment of the other devisees and legatees, had filed a bill to have him removed from his trust, and for a decree determining that he had received his share, and that the complainants were entitled to the remainder of the estate. Could Horatio be heard to allege, that a share of this or that piece of property which remained to the estate was his, notwithstanding his *devastavit*, that he had disposed not of his own interest in the undivided estate, but of that of his co-devisees and co-legatees *pro rata*; that the entire estate must be considered as by so much diminished, and he still be entitled to his proportion of the balance, leaving the other beneficiaries under the will to recover from him their interest in the amount of his *devastavit* as his simple contract creditors? Certainly not. In respect of honesty, there could be no defence of such claims, and their legal absurdity is just as apparent. They would involve nothing more nor less than the doctrine that *cestuis que trust* had no property in the trust fund, but were mere creditors of the trustee—a doctrine which is utterly untenable.

Now, if under the circumstances above supposed, there had been judgment creditors of Horatio just ready to subject still more of the testator's estate to the individual purposes of Horatio, (i. e. to the payment of his individual debts,) or in other words, seeking to have their claims against Horatio paid from the shares of his father's property which belonged to his co-devisees and co-legatees; would they, by force of their judgments, prevail against these complainants, though Horatio himself could not stand for a moment before them? To maintain the affirmative of this, we respectfully submit, involves the same doctrine which we have just, as it seems to us, disposed of, that the complainants were merely creditors of Horatio for their share of the testator's estate, and had no property in it, but only a

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personal claim upon the executors in respect of it, and were indeed upon the same footing with his ordinary individual creditors; and these latter, by obtaining a judgment, had acquired the advantage of a specific lien, and could make way with the testator's property in the hands of Horatio, though Horatio himself, as we have shown above, could not, against the complainants, retain it.

We had supposed the extent of judgment creditors' rights to be well defined, and incontestibly settled in this court; that such rights never could go beyond the judgment debtor's rights at the time of the recovery of the judgment, and never could, directly or indirectly, impair or retard the equities, apparent or latent, of third persons against the judgment debtor existing prior to the recovery of the judgment. This is, in the fullest and most unequivocal manner, affirmed to be the doctrine of this court, in the opinion of the learned assistant vice chancellor in the former suit between these parties, and the authorities cited fully sustain this doctrine.

Upon the former bill, it did not appear whether the devastation of Horatio was committed before or after the recovery of the defendants' judgment; it now appears that it was complete before the date of the judgment. Our claim then against Horatio and the estate of the testator in his hands at the time of the recovery of the defendants' judgment was fully ripe, and, in the language of the assistant vice chancellor, "its justice is perfectly manifest." We suppose its title to have its justice effectuated in a court of equity is equally manifest.

"The only open point in it," (the complainants' claim,) says the assistant vice chancellor, "is whether such claim is a right enforceable directly against the lands, or whether it is any thing more than a debt for money paid, to which all the debtor's property is liable, but which is not chargeable upon any specific portion of it until judgment or execution." Upon this point the assistant vice chancellor very properly withholds an opinion, as he did not suppose the former bill by its facts properly raised it.

If the house in Laight-street were Horatio's property, derived

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by purchase with his own moneys, then, and only then, we respectfully submit, would the "open point," "the only open point" really exist and require decision. It is as the testator's property, that we claim an equity, an equitable lien upon it to the disparagement of the defendants' legal lien. The controversy between us, (in this branch of the case,) is just this: a share in this Laight-street property, at law, belongs to your judgment debtor, and you, at law, by your judgment have a lien upon it. The property, however, is a part of the residuary estate of our testator, and your judgment debtor has had and disposed of \$50,000 or \$60,000 worth more than his share of the testator's residuary estate, and therefore all that we can find remaining belongs in equity to us. Still, the legal title being in Horatio, when you perfected your judgment, we are obliged to come into this court to have our equitable rights enforced, as paramount to your legal lien on property which did not, in equity, belong to your debtor when you recovered your judgment.

It is submitted that the whole point is, not whether this claim of ours would give us a lien upon specific portions of Horatio's property, but whether we were not, upon the facts of this bill, the equitable owners of the property in question when the defendants' judgment was recovered. Suppose we could trace \$5000 of the personal funds of the estate included in the devastavit, into a specific investment in real estate, would this judgment lien triumph over our right to follow the trust money? But here we find the very property which the testator owned in his lifetime. Cannot we, then, retain it from these defendants? If not, then these defendants are but continuing the devastavit in the name of Horatio. No amplitude of illustration or authority would assist the view of the case which we have thus presented, and it seems to us very clear, that for the whole amount of the devastavit, the complainants have an equitable lien upon all of the testator's property which they can find in Horatio's hands, prior to the legal lien of defendants' judgment, and the injunction should be sustained on this ground.

But the complainants are also able to present to the court the question, whether a creditor of Charles Wilkes, the testator,

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has not an equitable lien upon his estate devised to Horatio, better than an individual creditor of Horatio has, or can obtain by judgment? It is clear, that when one of several sureties pays the debt of his principal, he is subrogated to all the rights of the creditor against the principal and the other sureties. (1 *Story's Eq.* § 449. *Cuyler v. Ensworth*, 6 *Paige*, 32 *Eddy v. Traver*, *Idem*, 521. *Schermerhorn v. Barhydt*, 9 *Idem*, 28.)

That Hamilton Wilkes, in paying the debt of his testator to the Misses Garnett, was subrogated to all the rights which they had against the estate of Charles Wilkes and his legatees, cannot be disputed, and will probably be conceded. Who were the persons, then, who would have been liable to these creditors of Charles Wilkes, upon their failure to collect their debt from the executors? Manifestly the residuary legatees; and the same persons are also residuary devisees. How far are they liable as legatees? To the value of any assets of the testator which they may have received. (2 *R. S.* 368, § 26, 2d ed.) Are they severally liable in solido, or only proportionably? Only the latter; and the payment by a legatee of his proportion of the debt discharges him. (2 *R. S.* 369, §§ 28, 30, 31.) The Misses Garnett, then—it appearing that Horatio had received assets to a sufficient amount—would have recovered a judgment against him for his contributory share as residuary legatee; and of course could have collected no more than their rateable shares from the other legatees. If, then, they had failed to get from Horatio the amount for which they had judgment against him, they must go unpaid, or look elsewhere for their money. We will follow them a step further. The whole of the testator's estate having been disposed of by will, there are no heirs liable in respect of estate descended. The residuary devisees, therefore, must make up the deficiency not collected from the legatees. Horatio, with the others, who are residuary legatees, are also residuary devisees, and for his proportionate share the Misses Garnett will have judgment against him. (2 *R. S.* 371, §§ 52, 53. *Idem*, 372, § 60.) And this judgment will be a better lien at law, too, upon the estate

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devised to Horatio, than any judgment against him personally. (2 R. S. 371, § 48. *Idem*, 372, § 60.) It would seem, then, that the assistant vice chancellor was in error in assuming that the Misses Garnett could have collected their money from the legatees. Horatio's share they would have got from no one but himself; and he having made way with all the assets which he had received, and being insolvent, would have escaped as legatee, only, however, to be brought in as devisee. In other words, the interest of Horatio in the Laight-street house, which we are now seeking to appropriate to making good to Hamilton Wilkes Horatio's contributory share of the debt paid by Hamilton, would have been subjected to such payment by the Misses Garnett, and this judgment of the defendants, though prior in time, would have been at law, postponed in lien to the judgment of the Misses Garnett.

We have supposed that the creditor of Charles Wilkes, the testator, would have been driven to two suits before he would recover that portion of his claim which Horatio, in respect of the testator's property, devised and bequeathed to him, was liable to pay; it seems to us, however, that in a case where the persons liable as legatees and as devisees are the same, the necessity of an observance of the statutory order of proceedings would be superseded by the particular circumstances of the case, and the remedy be afforded to the creditor in one suit. The whole design of these statutory provisions seems to have been for the protection of the parties respectively standing behind others in the line of liability. But when the same parties are liable in either relation, the pursuit of them through the various relations in separate suits, seems entirely useless, and the statute becomes inapplicable.

But again; those provisions of the statute, are in their terms applicable only to suits actually inter partes, between the creditor and those who have succeeded to the debtor's property, and as they are given for the protection of the defendants in such suits, the benefit thereof can be waived by them. It is idle to contend that a devisee, aware that suits against the prior parties will result in nothing but accumulated costs

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which it will finally rest with him to discharge, is compelled by statute to insist upon the creditor's proceeding through all those parties. Thus, in the case at bar, Hamilton Wilkes knew that the claim of the Misses Garnett was a good one against the estate; that a suit against the executors would produce only \$2400; that for the deficiency the legatees would be rateably liable, and any still remaining deficiency would fall upon the devisees. All the legatees and devisees living assent to the payment, and there remains of Horatio's share ~~to~~ devisee, enough to contribute his proportion. Hamilton, therefore, promptly pays the whole debt, and charges the shares of the contributors thereto with their rateable proportions. By the death of Horatio, intestate, without issue and unmarried the mother, brothers and sisters have succeeded to his property, subject to this claim of Hamilton; and the matter could have been amicably settled among them, but for the impending judgment of these defendants and their recent proceedings in scire facias. The remarks of his honor the chancellor in the recent case of *Schermerhorn v. Barhydt*, (9 Paige, 47,) on the point of the necessity of a strict observance of the statutory rules, seem entirely appropriate to the case at bar; and the technical objections which in the face of *the perfectly manifest justice of our claim*, are set up by the defendants, are entirely met by the very sensible discrimination taken in the case cited.

We submit that the justice and equity of our claim upon Horatio's interest in the Laight-street property for his contributory share of the testator's debt paid by Hamilton Wilkes, is abundantly clear; that the power and duty of this court to enforce such justice and equity are equally clear; and that the injunction was properly granted, and should be continued on this ground. The other equities set up in the bill, and stated in the points submitted, will all fall within one or the other of the two heads of the foregoing discussion.

We have already supposed that a great point was gained in a court of equity, when the justice of a claim was acknowledged by the court to be perfectly manifest. Such is our case, as shown by our present bill, in the opinion of the assistant vice

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chancellor. Such, we doubt not, will it appear to the chancellor. If some inexorable rule of law exists to withstand the enforcement of such perfectly manifest justice, at law, we appeal to the origin, history and principles of this court, as of a tribunal existing, more than for any other purpose, to uphold manifest justice against the manifest injustice to which the very inflexibility of rules of law sometimes necessarily tends.

Do we then contend that the defendants are without rights? By no means. The effect of their judgment upon the devised lands, as against our prior equities against them, is this, that as our equities are good against both the testator's *personal property* and his real property in the hands of Horatio, and as the defendants' lien reaches only his real property, the defendants would have a right to require us to proceed against the testator's personal property to the exoneration of the real estate upon which their lien rested. This principle, to be sure, is of no avail in the case at bar; but only for a reason which strikingly confirms and illustrates our equities against the real property, to wit, that all the personalty of the testator included in Horatio's share of his father's estate, and in the amount wasted, had, before the claim of the Misses Garnett was paid, and before the devastavit was discovered, been devoted to the claims of those standing in the same right as these defendants, to wit, the personal creditors of Horatio.

The usual reasons even of injury or delay, from an injunction, to defendants, which will prove to have been unjust, if the cause, on the hearing, is decided in their favor, possess no force in this case. The court will observe that the life estate of Mrs. Janet Wilkes, the widow of Charles Wilkes, still continues, and the value of the reversion, on which alone the defendants' lien rests, is constantly increasing. The security of the bond, too, is entirely satisfactory to the defendants, and is ample in amount for their protection. The complainants, on the other hand, will be but poorly indemnified by a final decision in their favor, if the homestead shall have been sold under a judgment which was no equitable lien upon it.

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S. A. Foot, in reply. Horatio Wilkes, on the death of his father Charles Wilkes, became the absolute and sole owner of an undivided sixth part of the house and lot in Laight-street, subject to the life estate of his mother; or in other words, he was the sole and absolute owner of a vested remainder in an undivided sixth part of that house and lot.

This undivided sixth part was his separate property which he owned and held as a tenant in common with his co-devisees. This vested remainder in an undivided sixth part of that house and lot was held and owned by him in the same manner as any other piece of real estate which he might have acquired by purchase, and subject to the same and no other liabilities, liens or equities. The fact that he acquired title to it by virtue of a devise from his father, made it not the less his own absolute property than it would have been, had he obtained his title from a stranger; nor did that fact give his creditors any claim to or lien in law or equity upon it, which they would not have had if his title had come from a stranger. The creditors, however, of his father, have, under certain circumstances, an equitable lien upon it; but that lien is given by the statute only. A creditor of Charles Wilkes, the father, has no right or lien on this property, by the common law, which a creditor of Horatio Wilkes has not. And no case can be found to show that he has. The statute alone gives the creditor of Charles Wilkes his lien. And under what circumstances does the statute give it to him? The sections referred to in the opening argument give the answer.

There being, as appears on the face of the bill, sufficient personal property left by Charles Wilkes to pay all his debts, and there being still uninvested in the hands of his legatees sufficient personal property to pay all debts and claims against his estate which have been or may be presented; and no proceedings having been taken by any creditor or any person standing in the place of a creditor, before the proper surrogate's court, or at law, against the personal representatives or next of kin or the legatees of Charles Wilkes, the defendants submit that the com

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plainants have no ground on which to place their claim to the interposition of this court.

There is no doubt that the complainants, as argued by their counsel, have great and serious cause of complaint against Horatio Wilkes, and a legal and most just claim against him and his estate, for a large sum of money ; and that they had such claim when the defendants recovered their judgment ; and if they had prosecuted such claim at law or in equity, they would have obtained a judgment or decree for the amount ; which when obtained, would have been a lien on the property in question. But the law gives them no such lien until their judgment is recovered or decree obtained.

Hamilton Wilkes, standing in the place of the Garnetts, is bound by the statute to seek and take the satisfaction of his demand out of the personal estate of Charles Wilkes : and those legatees who pay him may call on their co-legatees to contribute their just proportion. But the legatees, who by paying, acquire a claim against their co-legatees for a contributive share, only acquire against them a lawful and just demand, the same precisely which one surety, who pays the whole debt, acquires against his co-sureties ; but they do not obtain a specific lien in law or equity on any property, real or personal, of their co-legatees or co-sureties. No case countenances such an idea. Before they can apply the property, real or personal, of their co-legatees or co-sureties, to the satisfaction of their demand, they must acquire a lien by judgment or decree, and if other judgments precede them they cannot ask a court to disregard them. These propositions are all so obvious that illustration seems unnecessary, and the true source of the error on the other side appears to consist in confounding the relations in which the complainants stand to each other and to Horatio Wilkes.

THE CHANCELLOR. Some of the principles of equity upon which the complainants found their claim to relief in this case have been so often examined and enforced in this court, that it is not necessary to do more than merely to state them at this time. It is perfectly well settled, as a general principle of equity,

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that where one person, or his property, stands in the situation of a surety for the payment of a debt, for which payment another person, or his property, is primarily liable, the one who is secondarily liable, upon payment of the debt to the original creditor, is entitled to be subrogated to all their rights and remedies of the creditor, as they then exist, against the principal debtor or his property. And where the original creditor has even an equitable lien upon the property of the person primarily liable to him, such lien may be upheld and enforced in favor of the substituted creditor, in preference to any subsequent lien or claim upon such property, unless it be a legal lien, or title acquired by a bona fide mortgagee, or purchaser, or pledgee, for a valuable consideration and without notice of the prior equitable right. And in all cases, in respect to mere equitable liens, the maxim prevails here, that he who is prior in time is stronger in right. It is also a settled principle in this court, that the general lien of a judgment upon the real estate of a debtor is subject to all the equities which existed against such real estate in favor of third persons, at the time of the recovery of such judgment. And a court of equity will control the legal lien of the judgment creditor so as to protect the rights of those who have prior equitable interests in, or liens on such property, or the proceeds thereof. In the recent case of *Buchan v. Sumner*, ante, p. 165,) I had occasion to apply this principle to the case of an equitable lien of a partner, upon real estate received by the firm in payment of a partnership debt, and where the legal title to the land was taken in the name of both the copartners. And it was there held, that the general lien of a judgment, recovered against one of the copartners for his individual debt, was subordinate to the equitable right of his copartners to have the whole proceeds of the land appropriated to pay the debts of the firm, and to equalize the claims of the copartners upon such proceeds, as partnership funds. It remains to be seen whether either of these equitable principles, or all of them combined, are sufficient to support the claim of the complainants, in the present case, to an equitable priority over the legal

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lien of the judgment of the defendants upon the real estate of Horatio Wilkes, devised to him by his father.

In examining this question it must be borne in mind, that the executors, as such, were not authorized to sell any portion of the residuary real estate of the testator for the purpose of distribution. And the only part of the real estate which they had any control over as executors, was the share of Mrs. Jeffrey; which was devised to the executrix and executors, as trustees, to sell the same and pay over the proceeds to her. The testator had therefore made a perfect discrimination between his real and personal estate, instead of placing the proceeds of the whole in the hands of his executors for distribution. Notwithstanding this, and although Horatio Wilkes's share of the real estate was devised to him directly and absolutely, the complainants contend that as he has wasted some part of their several shares of the personal estate, which has come to his hands as one of the executors, they have an equitable lien therefor upon the real estate to which he was entitled as a devisee of his father, to make good their loss; and that this lien is entitled to a priority over the legal lien which some of his other creditors have acquired, on such real estate, by their judgment. This is a new principle, which I think has never been recognized as existing, by this court or by any other court of equity. It is true, he derives his authority as executor under the will of his father, as well as the title to the real estate which is devised to him absolutely for his own use; but that does not appear to be an equitable hypothecation of his interest in the real estate as devisee, as a security for the faithful performance of his trust as executor. Indeed, if such an equitable principle exists, it would be unsafe for any one to deal with a devisee in relation to the estate devised, where such devisee was also an executor, without first inquiring and ascertaining that he had duly administered all the personal estate which had come to his hands as executor. For notice of the existence of the will under which the title to the real estate was derived, would be notice to a purchaser or mortgagee of such real estate, as well as to judgment creditors of the devisee, of this equitable hypothe-

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cation of his real estate as security for the discharge of his duties as executor. The equitable lien, if any exists in such a case, would not arise from the fact of his wasting the personal estate, which came to his hands as executor, but from his neglecting to distribute it among the creditors and legatees as soon as practicable after the death of the testator. And the legatees would have the right to file a bill, to enforce their equitable lien upon the real estate of the devisee, the moment he neglected to pay over any of the proceeds of the personal estate to which they were entitled. I am satisfied, however, that no such lien existed in favor of the complainants, on account of their shares of the personal estate which the acting executor received and appropriated to his own use.

They have even less claim to an equitable lien on account of their shares of the real estate, which they had authorized him to receive for them for the purposes of distribution. Whether the devisees themselves sold their several undivided portions of the lands, which they held with him as tenants in common, and allowed him to receive the whole purchase money, or whether they empowered him to sell and convey, as their attorney, does not appear. But in either case, the receipt by him of their several shares of the purchase money for the mere purpose of distribution, as their agent, would not give them a lien upon other real estate devised to him. Nor would his appropriating the whole proceeds of such sale to his own use give them such a lien. For, it would be but an ordinary debt recoverable against him in his private capacity, and not in his character of executor or devisee. If any equity exists, therefore, in this case, in favor of the complainants, or any of them, which entitles them to a preference over the legal lien of the judgment of the defendants, it must arise out of the payment of the debt due from the estate of the testator to the Misses Garnett. That question I will now proceed to consider.

Had the Misses Garnett, and the other creditors of the estate of C. Wilkes, if there were any others, a legal or an equitable lien upon the real estate of Horatio Wilkes as the devisee of his father, at the time of the recovery of the judgment of these de-

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fendants, which those creditors could have enforced, to the exclusion of or in preference to the claims of the proper creditors of Horatio Wilkes for his own debt? As the law then stood the surrogate could not order the sale of real estate, for the payment of the debts of the decedent, after the expiration of three years from the time of granting letters testamentary or of administration, even upon the application of the creditors, and where the personal estate of the decedent was insufficient to pay his debts. (2 R. S. 100, § 1. *Idem*, 108, § 48.) The only way, therefore, in which the Misses Garnett, or any other creditors of the decedent, could have reached the real estate in the hands of the devisees, or of any of them, was by a suit in equity, under the provisions of the revised statutes relative to proceedings against heirs and devisees. (2 R. S. 450.) There was no estate, real or personal, in this case, which was not disposed of by the will of the testator. The provisions of the statute relative to proceedings against the next of kin, and against heirs, may therefore be laid out of view here. But, to have entitled the creditors to sustain a suit to reach the real estate of the testator, in the hands of his devisees, in January, 1837, it would have been necessary for such creditors to state in their bill, that the personal estate of C. Wilkes which came to the hands of his executrix and executors, or of any of them, was not sufficient to pay his debts; or that, after due proceedings before the proper surrogate and at law, the creditors were not able to collect such debts from the personal representatives of the testator, nor from his legatees to whom a part of his personal estate had been paid on account of their legacies. (2 R. S. 452, § 33. *Idem*, 456, § 60.) Or, at least, the creditors would have been required to show a state of facts which would render any proceedings, by them, against the executrix and executors, or against the legatees, wholly unavailing for the recovery of the debt, or the particular part of it claimed by the bill.

I have examined the bill in this cause with great care, and have not been able to find any averment, or statement of facts which clearly and conclusively shows that the Misses Garnett, at the time of the docketing of the judgment of these defen-

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dants, and for some time afterwards, could not have recovered their debt by a proceeding before the surrogate, against the executrix and executors, to compel them to render an account of the personal estate of the testator, and to pay such debt out of such estate. Although it is stated in the bill that Horatio Wilkes had become insolvent about the latter part of 1836 or the beginning of 1837, it is not alleged that he was then entirely destitute of property, so that if he had been cited before the surrogate and ordered to pay the debt of the Misses Garnett, at the time of the recovery of the judgment of these defendants, nothing could have been obtained from property then in his hands; although such property may have been wholly insufficient to pay all of his debts.

I do not think, however, that the rights of these parties depend upon the question whether Horatio Wilkes had or had not wasted the assets in his hands, as the acting executor, previous to the recovery of the judgment of these defendants, or upon the question whether he was or was not then in a situation in which, by a proper proceeding against him, he might have been compelled to pay this debt to the Misses Garnett. But the right of subrogation depends upon the question whether, at the time their debt was paid by Hamilton Wilkes, in behalf of himself and the other complainants, the Misses Garnett could have filed a bill against the complainants, to restrain them from reviving their judgment, and to have the real estate of Horatio Wilkes, upon which it was a lien, applied to the payment of that part of the debt of the testator which these complainants, as legatees or devisees, were legally or equitably bound to pay.

Before the real property devised to either of the devisees could be reached by any of the creditors of the estate of Charles Wilkes, so as to subject the share of such devisee to his or her proportion of the debt, according to the new provisions on this subject contained in the revised statutes, it would be necessary for such creditors to show that they had exhausted their remedy at law against the several legatees, to whom the personal estate had been delivered in payment of their legacies. And here the case made by the complainants wholly fails to show

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that the Misses Garnett, at the time of the payment of their debt by Hamilton Wilkes, in May, 1840, had any lien, either at law or in equity, upon the real estate devised to Horatio Wilkes, for that part of their debt which any of these complainants were bound to pay, either as legatees or devisees of Charles Wilkes. For the statute only makes the devisees and legatees liable for their proportionate parts of the debts of the testator, according to the legacies which they have received, and the real estate devised to them; although the other legatees and devisees are insolvent and wholly unable to pay any thing. (2 R. S. 452, §§ 28, 31. *Idem*, 455, §§ 52, 53, 61.) The creditors, therefore, could not, in any form of proceeding, have reached the real estate devised to Horatio Wilkes, so as to overreach the lien of the prior judgment, so as to make it liable for the part of the debt of the testator for which the complainants were liable as legatees or devisees; but only for the proportionate part of Horatio Wilkes as a devisee, for which proportionate part of the debt neither the complainants nor their property was holden. All that was necessary for these complainants to do, therefore, to release themselves and their property from further liability, was to pay their proportionate parts of the debt, according to the provisions of the revised statutes on the subject. And having voluntarily paid that part of the debt for which they did not stand in the situation of sureties for Horatio Wilkes, they were not subrogated to the rights and remedies which the creditors previously had as against the lien of the judgment. They probably might have secured to themselves that remedy by taking an assignment of that part of the debt, instead of paying the demand of the Misses Garnett in full. But having neglected to do so, they have no lien upon the real estate in question, which is entitled to a priority, either at law or in equity, over the lien of the judgment of these defendants.

The injunction was therefore improperly granted in this case; and it must be dissolved, with costs to be taxed.

In the matter of the CROTON INSURANCE COMPANY.

Where an insurance company is interested in the prosecution of an appeal from a decree of salvage, and a third person, at the request of the corporation, becomes surety for the appellant, and the company becomes insolvent pending the appeal, the surety is not entitled to a priority in payment out of the property of the corporation, in the hands of a receiver, for the money which such surety is afterwards compelled to pay upon the appeal bond; although the liabilities of the corporation were considerably diminished by the result of such appeal.

Aliter where a third person becomes surety for the receiver of an insolvent corporation, upon an appeal brought by him for the benefit of the fund to which he is entitled as receiver, or where the fund coming to the hands of a receiver is actually increased to the extent of the moneys which such third person is obliged to pay in consequence of his having become such surety.

A person who pays money as surety for an insolvent corporation, is not entitled to a priority of payment, over other creditors of the corporation, out of its corporate property, in the hands of a receiver appointed by the court of chancery to close up the affairs of the company; but he is entitled to be paid rateably with other creditors, although he is not compelled to pay the claim for which he became liable as surety until after the appointment of the receiver.

THIS case came before the chancellor upon the petition of C. S. Wayne, for a priority in payment, out of the assets of the Croton Insurance Company, in the hands of the receiver; the company being insolvent. Previous to the insolvency of the corporation it had insured the schooner *Emeline Peterson*, by a time policy. During the continuance of the risk, the schooner was wrecked, and was abandoned by the master and crew. Subsequently, Hill and Wheaton, with the assistance of the master and crew, got the schooner off the shoals, upon which she had been wrecked, and brought her into Philadelphia. Hill and Wheaton there libelled her for salvage, and the master and crew intervened in that suit, by a supplementary libel, also claiming salvage for themselves. A decree was made awarding salvage to all the libellants, to the amount of \$1278, with costs. The insurance company, being liable to pay the amount of this decree, under its policy upon the vessel, appealed in the name of the owner of the vessel; and the petitioner, at the request of the corporation, became security to abide the judgment of the court upon the appeal. The schooner was thereupon released

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from the custody of the marshal, and was afterwards removed from the jurisdiction of the court, by the owner. Pending this appeal, the corporation became insolvent, and a receiver was appointed to wind up its affairs. The appeal was afterwards prosecuted to a decision, as the petitioner alleged, by the receiver; but the receiver denied that it was prosecuted by him, or by his authority or consent, or for his benefit. Upon the hearing of the appeal the supplemental libel was dismissed, and the salvage upon the vessel and cargo was reduced to \$800; leaving the proportion thereof which was chargeable upon the schooner, or its owner, and which the petitioner was liable to pay in consequence of his becoming such security upon the appeal, \$590,17, including costs.

G. R. J. Bowdoin, for the petitioner.

O. L. Barbour, for the receiver.

THE CHANCELLOR. Upon the facts stated in this petition, the petitioner is entitled to have the amount which he is liable to pay, on account of his suretiship, allowed as a just claim against the assets of the corporation, in the hands of the receiver; and to be discharged rateably with the claims of other creditors, when he shall have paid the same to the libellants, so as to discharge the corporation from any further claim of the libellants, or of the owner of the vessel, for the amount for which he is liable upon the appeal. To this extent the receiver swears he has offered to allow and register the claim, to be paid rateably with the claims of other creditors, out of the assets of the company, which may come to his hands for distribution. And I see nothing in the facts of this claim entitling it to a preference in payment out of the funds which are in the hands of the receiver, over other debts due from this insolvent corporation.

Wayne's contract was with the corporation, before its insolvency, and not with the receiver; and the effect of the decision upon the appeal was not to increase the funds in the hands of the receiver, but merely to diminish the amount of a

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claim which, if the original decree had not been appealed from, would have been payable out of the corporate funds rateably with all other debts. The claim of the petitioner would have been entirely different if he had become the surety upon an appeal brought by the receiver of the corporation, after his appointment as such receiver, and at his request; or if the funds in the hands of the receiver had actually been increased by any thing done by the petitioner for him, or at his request.

Petition dismissed.

MANN vs. BUTLER and others.

Where the associates, or shareholders, of a private association are numerous, a bill may be filed by one of such associates, in behalf of himself and all the others against the trustees of such association, to compel the execution of the trust, and for an account and distribution of the funds and property of the association among the shareholders. And it is not necessary that all of the associates should unite in a bill for that purpose.

Where the legal title to trust property is in the trustees, so that a decree directing a sale of the property, either by the trustees or by a receiver, will give a good and valid title to a purchaser, if the *cestuis que trust* are numerous, or if some of them are unknown, it is not necessary to make them all parties to a bill to compel the execution of the trust, and for an account and distribution; but a part may sue in behalf of themselves and others. And the court will see that the rights of all to their distributive shares of the trust fund are protected by the decree in the cause.

Where it was provided, by one of the articles of association of a private company, that within six years from the date of such articles, the trustees should proceed to take measures for closing the concerns of the association, and to that end should cause all effects and securities held by them, or by the association, to be collected, or converted into money, and all the property to be converted into money, by sale or otherwise, as fast as practicable; and should, from time to time, declare and pay to the shareholders dividends on the capital stock, until all the property and effects of the association should be divided among the stockholders; *Held*, that although it might not be for the interest of all the shareholders, or even of a majority of them, to have the property and effects of the association converted into money, and distributed, at the time specified in the articles of association, yet, if any of the shareholders desired to have it done for their benefit, they had a right to insist that the written contract should be carried into effect, according to its spirit and intent without any unreasonable delay.

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Held also, that if the lands could not be disposed of for cash, at private sale, the trustees should sell them at auction; after giving reasonable notice to the shareholders, so that they might attend the sale and see that the property was not sold below its cash value. And that the same disposition should be made of the bonds and mortgages, and other securities, if they could not be collected, or sold at private sale, within a reasonable time.

THIS cause came before the chancellor upon the demurrer of the defendants to the bill of complaint. The bill was filed by the complainant, as one of the associates or shareholders of a private association called The American Land Company, in behalf of himself and all the other shareholders, against the defendants as the trustees of the association, to compel the execution of the trust, and for an account and distribution of the property and funds of the association among the shareholders. The association was formed in July, 1835, with a capital of one million of dollars, divided into ten thousand shares, of \$100 each, transferable in the manner provided by the articles of association; and its object was to purchase and sell lands within the United States, for the benefit of the members of the association. The articles of association provided, that the affairs, property and concerns of the company should be managed by five trustees, in whom the legal title to all lands purchased for the benefit of the associates was to be vested, as joint tenants, and not as tenants in common, and without specifying any trust in the conveyances by which such lands were acquired. The powers and duties of the trustees, as prescribed by the 15th article of the agreement or articles of association, were as follows:

1. To receive and take charge of all moneys which should be paid on account of the capital of the association, or which should accrue to the association from sales, or in any other way, or to which it might in any way be entitled.

2. To invest the capital of the association and all other moneys which the trustees should receive on account thereof, over and above the actual expenses of the trust, in the purchase of lands in the southern and western states and territories of the United States, and in such other state or states as they might think expedient.

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3. To sell and convey, from time to time, as they might find opportunity, any part, or all, of the land so to be purchased by them, and to take such securities for the purchase money as they should think fit.

4. To pay, from time to time, out of the funds of the association, the compensation of persons employed by them, and all other necessary expenses.

5. To make dividends from time to time, to and among the several shareholders, of such profits as should accrue to the association over and above the amount of its capital and debts; for the satisfaction of which, an equivalent amount of lands at their cost to the association, or of good securities, should be kept until the end of six years from the date of the articles of association, or the trustees, in their discretion, might accumulate such profits and re-invest the same in the purchase of other lands for the benefit of the association.

6. To make all contracts, and do all lawful things and acts which might be necessary or proper to carry into effect the objects of the association.

And the twenty-fourth article of the agreement of the associates further provided, that immediately after the expiration of six years from the date of such agreement, the trustees for the time being should proceed to take measures for closing the concerns of the association; and to that end, should cause all effects and securities held by them or the association to be collected, or converted into money, and all the property of every description then held by such association, to be converted into money, by sale or otherwise, as fast as the same could be done; and should, from time to time, declare and pay to the shareholders of the capital of the association, dividends thereon, until all the property and effects of the association should be fully and justly divided among the holders of such shares.

The bill in this cause was filed in July, 1846, and stated, among other things, that the whole capital of the association was subscribed for, and paid to the trustees; that they invested it in the purchase of lands which were conveyed to the then trustees, according to the provisions of the articles of association

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during the years 1835 and 1836 ; that two of the original trustees had resigned, and two of the defendants in this suit had been duly appointed in their places, and had become vested with their title to the trust property ; that the trustees had sold considerable quantities of the lands purchased by them, upon long credits, and taken back securities for the payment of the purchase money, which securities still remained in their hands not converted into money ; that other portions of the trust lands had been exchanged for stocks ; that about two hundred and seventy thousand acres of the lands, situated in the states of Ohio, Indiana, Illinois, Mississippi, Arkansas, and Georgia, and in the territory of Wisconsin, of the estimated value of about one million of dollars, remained in the hands of the defendants, as trustees, unsold and undisposed of by them ; and that bonds and mortgages, and other securities, for lands sold, to the amount of more than \$300,000, also remained in the hands and under the control of the defendants uncollected and undisposed of ; contrary to the provisions of the articles of association and the obligations and duties of the trustees ; that one of the original trustees had become insolvent and had absconded to parts unknown, and that all his interest in the lands and funds of the association had been duly transferred and conveyed to the defendants, the four remaining trustees, so that he had ceased to be a trustee according to the articles of association, but that no person had since been appointed a trustee in his place. And the complainant prayed that a suitable and proper person might be appointed to supply the vacancy.

The bill further stated that the persons who now claimed to be shareholders, or to have an interest in the property and effects of the association, exceeded one hundred and forty individuals, most of whom were unknown to the complainant ; that some of them resided in Massachusetts, some in Canada, and some in Great Britain, and that the residences of others were unknown to him and could not be ascertained upon diligent inquiry ; so that it was impracticable to make them parties to this suit, or to prosecute the same effectually if they should all be made defendants therein. The complainant also charged, in his bill,

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that he had at different times since the expiration of the six years, applied to the defendants to take immediate and effectual measures to close the concerns of the association, and to cause all the property, effects and securities to be converted into money, by sale or otherwise, and to divide the avails and proceeds thereof among the shareholders according to the provisions of the articles of association; but that they utterly neglected and refused to do so, alleging sometimes that it was improper and impolitic, at other times that it would cause a great sacrifice of the securities and lands, at other times that they were not bound to do so by the articles of the association, and at other times that it was impossible to close the affairs of the association, or to agree among themselves, or with the shareholders, upon any plan of collection, or of sale, or of proceedings to close the concern in a safe and expedient manner; the contrary of all which allegations and pretences, the complainant expressly charged.

The bill prayed a discovery from the defendants of the particulars of the property and effects of the association, and the situation and estimated value thereof, and of the names and residences of the shareholders and the number of shares held by each; and that the lands remaining unsold might be sold and converted into money, by the defendants, under the direction and decree of the court; and that the securities might also be collected, or sold and converted into money, and the moneys divided among the shareholders, or that the property and effects of the association might be transferred to a receiver to sell and distribute the proceeds under the order and direction of the court, or for such other relief as the complainant and the other shareholders were entitled to upon the case made by the bill.

The defendants demurred to all the discovery and relief prayed by the bill, except as to the insolvency and absconding of one of the trustees, and the transfer of his interest to the defendants and their neglect to appoint a new trustee in his place, and as to the appointment by the court of a trustee to supply the vacancy.

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A. Mann, Jun., complainant, in person.

F. F. Marbury & B. F. Butler, for defendants.

THE CHANCELLOR. Although the question of parties was not raised by the demurrer, upon the record, yet, as it was raised *ore tenus*, upon the argument, it may be necessary to consider it. And there can be no doubt, upon the facts stated in the complainant's bill, that this is not a case in which it was necessary to make all the shareholders of the association parties to the suit by name; but that the bill is properly filed by one of the shareholders in behalf of himself and all the others who have a common interest with him in having the effects of the association converted into money, and distributed among the several shareholders according to the provisions of the articles of association. The bill shows that there are at least one hundred and forty persons claiming to be shareholders; and if they were all within the jurisdiction of the court, and known to the complainant, it would be very inconvenient, if not wholly impracticable, to make them all defendants and to bring the suit to a termination during the present generation. For with so many parties before the court, the suit would probably abate, by death or otherwise, as fast as the necessary proceedings could be had to revive, from time to time.

Nor is this one of those cases in which it is necessary for the protection of the rights of any of the parties in interest, that all the shareholders should be before the court. The defendants have not only the whole legal power and disposition of the property, but the articles of association expressly provide that the conveyances shall be taken to them, without specifying that the lands are held in trust for any persons as cestuis que trust. A decree, therefore, directing a sale of the property, either by the defendants or by a receiver appointed by the court and to whom they may transfer the title to the lands which is now in them, will give a good and valid title to the purchaser. Where that is the case, if the cestuis que trust are numerous, or if some of them are unknown, it is not necessary to make them

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all parties to the suit ; but a part may sue in behalf of themselves and others. And the court will see that the rights of all to distributive shares of the trust fund is protected by the decree in the cause. (*Court v. Jeffery*, 1 *Sim. & Stew. Rep.* 105. *Douglass v. Horsefall*, 2 *Idem*, 184. *Adair v. New River Company*, 11 *Ves.* 444. *Good v. Blewitt*, 13 *Idem*, 397. 19 *Idem*, 336, *S. C.* *Taylor v. Salmon*, 4 *Myl. & Craig*, 142.)

The defendants are also wrong in supposing that this is not a proper case to file a bill to compel the execution of the trust ; even if the trustees have acted in good faith in delaying the sale of the lands, and the conversion of the securities into money, for more than five years after the time specified in the articles of association for that purpose. Although it may not be for the interest of all the shareholders, or even of a majority of them, to have the property and effects of the association converted into money and distributed, at the time specified in the articles of association, yet if some of the shareholders wish it done for their benefit, they have a right to insist that the written contract shall be carried into effect according to its spirit and intent, without any unreasonable delay. And if the lands cannot be disposed of for cash at private sale, the trustees should sell them at auction ; after giving reasonable notice to the shareholders, by public advertisements or otherwise, so that they may attend the sale and see that the property is not sold below its cash value. The same disposition should be made of the bonds and mortgages, and other securities, if they cannot be collected, or sold at private sale, within a reasonable time. And such was undoubtedly the intention of the associates originally. For the 24th article provides that at the expiration of the six years the trustees shall cause the securities held by them to be collected, *or converted into money*. That is, if they cannot be collected without any unreasonable delay, either because they have not become payable or otherwise, they shall be converted into money by a sale thereof for cash. The complainant, therefore, has the right to insist that the trustees shall proceed without any unreasonable delay, to close up their trust. And if the trustees cannot agree among themselves as to the time and manner of disposing of

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the property, &c. as they allege, it is the duty of the court to direct as to the manner in which it shall be done.

There is nothing in the 27th article which is inconsistent with the 24th, or which authorizes a majority of the shareholders to delay the winding up of the affairs of the association, after the expiration of the six years. The article providing for the annual meeting, it is true, gives to the shareholders the power to give such directions, and to take such orders concerning the capital and property of the association and the management and disposition thereof, as they may think proper; but that power is limited by a proviso that such orders and directions shall be consistent with the other provisions of the articles of association. And they must also be assented to by a majority in interest of all the shareholders. A majority of shareholders, at such annual meeting, have not the power, without the consent of all the associates, to give any order or direction which shall delay or impede the closing up of the affairs of the association, at the time and in the manner prescribed in the 24th article. It was not necessary, therefore, that the complainant, by his bill, should allege that no such order or direction had been given.

If the allegations in the bill are true, the complainant is entitled to the discovery and relief covered by this demurrer. And the question as to the good faith of the trustees in delaying the sale of the lands and securities, for the length of time which has elapsed since the expiration of the six years, can only properly be considered upon the final hearing; in reference to the question of costs, &c.

The demurrer must be overruled, with costs; and the defendants must pay those costs and put in their answer within forty days, or the bill must be taken as confessed against them, unless further time to answer is given by a judge of the supreme court.

VANCE vs. ANDREWS.

Where a simple bill of discovery, in aid of a suit at law, shows that the complainant has a good cause of action against the defendant in the action at law, and that the discovery sought for is material to enable the complainant to succeed in such action, it is not necessary, except for the purpose of obtaining an injunction, for the complainant to allege in his bill that he cannot establish his right at law without a discovery from the defendant.

The filing of a bill of discovery in aid of a suit at law is justifiable, where the costs of such bill will probably be less than the expense of executing a commission, in a foreign country, to prove the facts of which a discovery is sought.

THIS was an appeal, by the defendant, from an order of the late vice chancellor of the first circuit, overruling a demurrer to a bill of discovery in aid of a suit at law. The defendant was formerly a merchant residing in Ireland, and before he came to this country accepted a bill, now belonging to the complainant. He afterwards became a bankrupt, and came to this country to reside, without having obtained a certificate. Being sued upon the bill here, he denied his signature to the acceptance, and the complainant was unable to prove his signature without the delay and expense of executing a commission in Ireland.

C. W. Sandford, for the appellant.

Daniel Lord, for the respondent.

THE CHANCELLOR. The bill in this case shows that the complainant has a good cause of action against the defendant, in the suit at law, and that the discovery sought for is material to enable the complainant to succeed in that suit. In such a case it is not necessary, in a simple bill of discovery, except for the purpose of obtaining an injunction, for the complainant to allege that he cannot establish his right at law without a discovery from the defendant.^(a) But even for the purposes of an injunction the facts stated in this bill appear to

^(a) See *March v. Davison*, (9 *Paige's Rep.* 580; *Welf. Eq. Plead.* 119; *Wigram on Disc.* 4, 5.

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be sufficient. For the expense of executing a commission in Ireland would probably far exceed the costs of a bill of discovery. And where the defendant compels his adversary to incur such an expense by refusing to admit the acceptance of the bill, he cannot rightfully complain if he is compelled to put in an answer to the bill and make the required discovery, even at his own expense.

The order appealed from must be affirmed with costs.

WATT vs. WATT and others.

A regular decree, entered by default, will not be opened to let in a defence of usury ; without an offer on the part of the defendant to waive the forfeiture, and to consent to a decree for the payment of what is equitably due.

Where a power of attorney authorizes the person appointed to appoint an attorney *under him*, and to revoke such appointment at his pleasure, the death of the principal attorney necessarily revokes the power of the substitute.

The right which a person acquires by the purchase of all the interest of the mortgagor, in the mortgaged premises, after the mortgagor has suffered a bill of foreclosure to be taken as confessed against him, is subject to the rights which the complainant has acquired in that suit, and to the admissions which the mortgagor has made, by suffering the bill to be taken as confessed. And while the order taking the bill as confessed against the mortgagor remains in force as to him, his grantee cannot set up a defence which the mortgagor himself could not have made, had he continued to be the owner of the equity of redemption.

THIS was an appeal, by the complainant, from an order of the vice chancellor of the first circuit, setting aside an order to take the bill as confessed against M. G. Pinckney, one of the defendants ; and allowing her to put in the answer of which a copy was used upon the application. The original bill was filed in November, 1840, upon the oath of the complainant, to foreclose a mortgage executed in August, 1834, by the defendant Archibald Watt, to the complainant, upon a very large number of unimproved building lots in the twelfth ward of the city of New-York. The mortgage was given to secure the

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payment, in March, 1839, of \$125,000, with annual interest at six per cent from the first of March, 1834, and there was due upon it, to the complainant, for principal and interest, on the 31st of October, 1840, as stated on oath in his bill, the sum of \$174,083.

The premises, at the time of the execution of the mortgage, were encumbered with several previous mortgages; and the mortgage to the complainant contained a covenant, on his part, that upon payment of any part of his mortgage, or of the previous incumbrances on the premises, by the mortgagor or his assigns, he would, for every \$70 thus paid, release one of the vacant lots from the lien of the mortgage. Several portions of the mortgaged premises were accordingly released from the lien of the mortgage, by the complainant, or his attorney lawfully authorized, and which the bill admitted were legally discharged from such lien. Two other releases were executed, in the name of the complainant, by J. L. Bell, who claimed to be authorized to do so by virtue of a power of substitution, executed by the complainant's attorney, appointing Bell an attorney under him. But the complainant denied the authority of Bell, and repudiated the releases; upon the ground that the principal attorney, who appointed Bell as attorney under himself, was known to be dead long before the execution of those releases. The complainant therefore claimed to enforce the lien of the mortgage against the lots so attempted to be released in his name.

G. B. Butler, for the appellant.

J. L. Mason, for the respondent.

THE CHANCELLOR. An examination of the facts in this case will show, that the vice chancellor erred in permitting the grantee of Archibald Watt to come in and make a defence in this cause which the grantor himself was not authorized to make, at the time of the conveyance from him to such grantee, in March, 1843. At the time of the filing of the bill in this cause, the title to the equity of redemption, in nearly all of the

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mortgaged premises which had not been released from the lien of the mortgage, was in A. Watt the mortgagor. And the respondent was made a party defendant only because she was the apparent owner of the equity of redemption in eight of the lots covered by the mortgage; and her sister A. H. Pinckney was also made a party as the apparent owner of eight other lots. But it is not pretended that any of these sixteen lots were those which the mortgagor claimed to have released, or which were afterwards decreed to be released from the lien of the complainant's mortgage. Indeed the interests of both of these young ladies in the mortgaged premises were merely nominal; for it appears by the affidavit of Mr. Butler, that their lots had been sold for taxes, for a term of three hundred years, and had not been redeemed. And it does not appear from any of the papers before me on this appeal, that any of the lots which the decree of the vice chancellor had directed to be released, belonged to A. Watt at the time of the conveyance from him to the respondent, in 1843.

This bill was regularly taken as confessed against Archibald Watt and wife, in August, 1841, about the time of making the decree by the assistant vice chancellor in the other suit; and both verbal and written notice of the order was immediately given. Their solicitor was also repeatedly informed that the complainant was determined not to have their default opened. If Watt and wife, therefore, had any defence to the suit originally, they were not in a situation to make it, or to ask to have the order taking the bill as confessed set aside, at the time of their conveyance to the respondent; which was more than eighteen months afterwards. Besides; it is perfectly evident from the answer which the respondent proposes to put in, that she knows nothing of the defence attempted to be set up in that answer, except from the information of A. Watt.

Again; if the defence of usury in fact existed in this case, which is positively contradicted by the affidavit of the complainant, it would not be proper to open a regular default to let in that defence, without an offer on the part of the defendant to waive the forfeiture, and to consent to a decree for the pay-

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ment of what was equitably due. The complainant is also right in supposing that the authority of Bell, as the attorney substituted by Ogilvie, ceased by the death of the latter. It is not necessary to say whether that would be the case where there was a general power of substitution, and without giving a right to revoke the authority of the substitute. But in this case the authority given to Ogilvie was to appoint an attorney *under him*, and to revoke such appointment at his pleasure. In such a case, the death of the principal attorney necessarily revokes the power of the substitute ; as he is no longer an attorney under such principal attorney, within the meaning of the original power to substitute an attorney under him.

The right which the appellant acquired by the conveyance of all the interest of Archibald Watt in the mortgaged premises subject to the several liens and incumbrances thereon, was subject of course to the rights which the complainant had then acquired in this suit, and to the admissions which the grantor had made by suffering the bill to be taken as confessed against him. And while the order taking the bill as confessed remains in full force as to him, his grantee can set up no defence which Archibald Watt himself could not have made if he had continued to be the owner of the equity of redemption which he has conveyed to her. (*Bank of Utica v. Finch*, 1 Barb. Ch. Rep. 75.)

Although the bill was regularly taken as confessed against the respondent, both as to her original interest in the matters in controversy, and also as an heir at law to her sister, I should require the complainant to release her interest in the sixteen lots from the lien of the mortgage, or permit her to put in a proper answer to protect her rights in those lots, if there was any fact sworn to, as being within her own knowledge, constituting a valid defence. But as nothing of that kind appears, the only proper course seems to be to reverse the order appealed from entirely, and to dismiss the respondent's application.

Order accordingly.

In the matter of KANE and another, infants.

It is a settled principle of the court of chancery, not to allow maintenance on behalf of infants, out of their property, unless it will be for their benefit to order such an allowance. And it is not for the benefit of infants to direct an allowance out of their general estate where they have any other sufficient provision for their maintenance, or a right, which can be enforced, to demand it from other sources.

The court will not direct an allowance to the father of infants, out of their estate, where he is of sufficient ability to maintain and bring them up without it, in reference to their situation and prospects in life; having a due regard to the claims of others upon his bounty.

The amount of the fortunes of the children, as well as the situation, ability, and circumstances of the father, should be taken into consideration, by the court, in determining the question whether he shall have an allowance out of their property for their support during their minorities.

The English court of chancery formerly adopted a very rigid rule in relation to past maintenance by the father, by refusing to make a retrospective order in any case. *It seems* however that the proper rule here is for the court to direct an inquiry as to the propriety of allowing for past maintenance, where a special case is made; but not to direct such an inquiry, as a matter of course, upon a mere petition showing the inability of the father to support his children, at the time such support was furnished them.

To entitle the father even to an inquiry, as to the propriety of making an allowance for past support of his infant children, he should state a special case, showing the extent of his means, at the time such support was furnished, and the particulars of the extraordinary expenditures, for the actual benefit of the infants, which create an equitable claim in his favor.

Where a contingent interest in personal estate is not legally and effectually disposed of by the will of the testator, it belongs to the personal representatives of those who were his next of kin at the time of his death, and not to those who are the next of kin at the time of the happening of the contingency upon which the intestacy as to that contingent interest depends.

The surviving husband of a niece, who was the next of kin of the testator at his death and during her coverture, and not the children or next of kin of the deceased niece, who were the nearest of kin to the testator at the time of the happening of the contingency, is entitled to a contingent interest in the personal estate of such testator not effectually disposed of by the will.

THIS was an application by J. I. Kane, the father and general guardian of his infant children, for an allowance, out of their property, for their education and support. The petitioner stated that his two children, who were of the ages of nine and eleven years, had, by the death of their mother and

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of their aunt, become entitled to a large property, amounting to about \$120,000; that they had continued to reside with him since the death of their mother, in the autumn of 1842, and had been supported by him; that for their proper education and support in the county of Westchester, where he and they resided, and to fit them to occupy the position in life to which their future prospects entitled them, he had found it necessary to live in a far different and much more expensive manner than he should have considered it necessary to do as a single man and without children; that his whole property, including his country residence in Westchester, was not worth more than \$25,000, estimating such country residence at \$15,000; and that the yearly income of his other property, exclusive of such residence, did not exceed \$500. In addition to this, however, he stated that his mother had allowed him annually about \$2000. The petitioner, therefore, asked an allowance for past maintenance, as well as for the future support and education of his children. The fortunes of the infants consisted principally, if not wholly, of property which they had derived under the will of their grand uncle, W. Cook, deceased; the substance of which will is stated in the report of the case of *Gott and others v. Cook*, (7 *Paige's Rep.* 521,) in relation to the construction and validity of the provisions of that will.

J. I. Kane, the petitioner, in person.

THE CHANCELLOR. It is a settled principle of the court of chancery, not to allow maintenance on behalf of infants, out of their property, unless it will be for their benefit to order such an allowance. And it is not for the benefit of infants to direct an allowance out of their general estate where they have any other sufficient provision for their maintenance, or a right, which can be enforced, to demand it from other sources. The court, therefore, will not direct an allowance to the father of the infants, out of their estate, where he is of sufficient ability to maintain and bring them up without it, in reference to their situation and prospects in life; having a due regard to the

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claims of others upon his bounty. Thus, in the case of *Jackson v. Jackson*, (*West's Ch. Rep.* 31,) where it appeared that the father was of sufficient ability to maintain his infant child, Lord Hardwicke refused to allow maintenance out of the proceeds of a legacy given to the infant, by the will of his mother. And in the subsequent case of *Darley v. Darley*, (*3 Atk. Rep.* 399,) where the father of the infants claimed an allowance out of a legacy he had received for his children, for moneys expended for the maintenance of the one, and the apprenticing of the other, the same distinguished judge refused to sanction the claim. He said, where legacies were given to a child, by a relative, the father could not make use of it in the maintenance of such child, but must provide for him out of his own pocket; nor could he set him out in the world, or put him out as apprentice or clerk, with the money arising from the legacy; and if he did, he would not be allowed for it. So in *Wellesley v. Beaufort*, (*2 Russ. Rep.* 28,) Lord Eldon says: "The court considers the duty of the father imposes thus much on him, that if he be himself of ability to maintain his children and to provide for them according to their expectations, be their fortunes what they may, it says you shall provide for them out of your own means, and not encroach upon the property of the children." The same principle will be found established in many other cases.

The amount of the fortunes of the children, as well as the situation, ability, and circumstances of the father, should, however, be taken into consideration by the court, in determining the question whether he shall have an allowance out of their property for their support during their minorities. And in the present case, if the income of the father does not in fact exceed what he supposes it to be by his petition, and if he is right in supposing that his children are entitled to the present income of all the property which was limited over to them by the will of W. Cook, in the events which have occurred, it would be unreasonable to require him to educate and support them entirely at his own expense. For although there does not at present appear to be any other claimant upon his bounty, he may

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reasonably wish to provide for the contingency of a second marriage, and the expenses of bringing up and educating the children who might result from that marriage.

I think, however, the petitioner is under a mistake in supposing that these infants are entitled to the present income of the whole estate, which was given to them by the will of their grand uncle, in the events which have happened. My recollection of the case that was before me, in relation to that will, is, that the property of the testator was mostly personal estate, and that the decree declared that the income of the estate during the minorities of the infants, in the events that have happened, was not legally disposed of by the will; that so far as such income arose from the personal estate of the testator, it belonged to his next of kin, and that it belonged to his heirs at law only so far as it arose from real estate, or from the proceeds of real estate converted into personalty for the purposes of the will; and that upon the happening of these contingencies, the executors and trustees were directed to distribute it accordingly, during the minorities of these infants.

If I am right in reference to the decree which was made in that case, therefore, the income of one-fourth of the personal estate, from the time of the death of the petitioner's wife until the death of her sister, and of one-half of such personal estate, since the death of her sister and during the minority of these infants respectively, belongs to J. I. Kane and not to his children; unless the mother of the testator made a testamentary disposition of her distributive share, of the personal estate of her son, which was not validly and effectually disposed of by his will.

It appears by the case of *Gott v. Cook*, (7 *Paige's Rep.* 521,) that at the death of W. Cook his mother and his two nieces were his only heirs at law and next of kin. Those three persons, therefore, were entitled to all the interests in his estate, either present or future, which were not legally and effectually disposed of by his will. And if they made no disposition of such interests, those interests were of course, upon their deaths respectively, cast upon those persons to whom the laws of the state gave them. It appears too, by the report of that case, that the

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testator's mother died before the commencement of that suit ; and of course, during the lifetime of Mrs. Kane. Her contingent interest, therefore, in the income of the estate of the testator which was not legally disposed of by his will in the events which have since happened, devolved upon her two grandchildren, Mrs. Kane and Janet Cook, as her heirs at law and next of kin. Mrs. Kane then, at the time of her death, in September, 1842, was entitled to one moiety of that contingent interest in one half of the income of the estate, during the minorities of her infant children respectively, which was not legally disposed of by the will ; and Jane Cook was entitled to the other moiety of that half. And upon the death of both nieces, so much of that income as was thereafter to arise from real estate, or the proceeds thereof, descended to their heirs at law as real estate ; and so much thereof as was to arise from the proceeds of personal estate belonged to their respective husbands, as the personal representatives and distributees of their wives, under the statute of distributions.

So in relation to the contingent interest in the income of Jane Cook's half of the estate, after her death and during the minorities of her sister's children respectively, which, in the event that has occurred, was not legally disposed of by the testator. One moiety of that contingent interest belonged to Mrs. Kane and the other half to her sister, at the time of their deaths respectively. And that part of the income which was or is to arise from the personal estate now belongs to their husbands, and that which was or is to arise from the testator's real estate, or the proceeds of it, belongs to these infants as the heirs at law of their mother and sister.

If I am right, therefore, as to the facts of this case, the income of one fourth of the personal estate of the testator, which the petitioner was entitled to receive as the representative and distributee of his wife, between the time of her death and the decease of her sister, was an ample fund for the support of his infant children during that period of time, when the expenses of their support could not have been very great. And the income of the half of the personal estate of the testator since that time, and that which is hereafter to arise, will probably be much

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more than sufficient to provide for the maintenance and education of the infants during the residue of their minorities respectively; leaving to the petitioner the full benefit of all his other property for his own support, and the support of any other family he may hereafter have. In that case no allowance for the antecedent or future support of these infants out of their own property should be made; but the petitioner should be directed to invest the income of their property, which he may receive from time to time, and accumulate it for them respectively during their minorities.

In case I have mistaken the facts of the case, so that the petitioner is not entitled to these contingent interests in the personal estate of the testator which were not effectually disposed of by the will, the petitioner may have the usual order of reference, to Master Prunyn, to inquire and report whether the petitioner is of sufficient ability to provide for the support and education of his infant children, according to their situation in life, and in reference to their present income and the amount of the estate which is to come to them when they shall be of full age. And if the master arrives at the conclusion that the petitioner is not of sufficient ability, then he is to state what allowance should be made to the petitioner for the support of the infants, from time to time, out of the income of their property; to the end that upon the coming in of the report such order may be made in the premises as shall be just. This appears to be the proper order in such cases, according to the statement of Lord Thurlow in the case of *Hughes v. Hughes*, (1 Bro. C. C. 386.) As to past maintenance by the father, the English court of chancery appears to have adopted a very rigid rule, by refusing to make a retrospective order in any case. (*Andrews v. Partington*, 2 Cox's C. C. 223.) But in the recent case of *Ex parte Bond*, (2 Myl. & Keen's Rep. 439,) the master of the rolls, although he admitted the general rule on this subject to be not to allow to the father for the past maintenance of his infant child, which maintenance the law had imposed upon the father as a duty, said that if a special case were made the court might direct an inquiry as to the propriety of allowing for past maintenance. This appears to be the proper rule on the sub

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ject ; not to direct an inquiry as to the propriety of allowing past maintenance, as a matter of course, upon a mere petition showing the inability of the father to support his children at the time such support was furnished to them. But to entitle the father even to an inquiry as to the *propriety* of making an allowance for past support, he should state a special case, showing the extent of his means at the time such support was furnished, and the particulars of the extraordinary expenditures for the actual benefit of the infant which created an equitable claim in his favor.

In the present instance, if the infants, and not the father, are entitled to the present income of the half of the personal estate, bequeathed by the will of W. Cook, the petitioner has made out a case entitling him to some allowance out of their estates for future maintenance ; but not such a case as would entitle him, *prima facie*, to an allowance for past support.

In the matter of WADSWORTH.

[Followed, 3 Barb. Ch. 100.]

The common law has made no provision for the execution of a joint trust by one of the trustees, where the co-trustee, by reason of lunacy or other inability, becomes incompetent to execute the trust.

In such a case it is proper for the court of chancery to interfere, to remove the lunatic trustee, under the provisions of the revised statutes ; so that the trusts may be executed, either by the remaining trustee, or by him and such other person as may be substituted in the place of the lunatic.

Where a single trust is created, it is not competent for the court of chancery to remove one of the trustees from a part of the trust, and to appoint another in his place, to act with the co-trustees in part only.

But where separate and distinct trusts are created by a testator, as to different portions of his property, and for the benefit of different persons, and which trusts are separate and distinct from the trusts and trust powers which are conferred upon the trustees in their character of executors, one of the trustees may decline one of the trusts attempted to be conferred upon him, and may accept another of such trusts, and may take out letters testamentary and assume the duties of an executor.

A lunatic trustee, who is also an executor, may be removed from his office of trustee

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of a special trust not connected with his executorship, without interfering with a trust conferred upon him as executor.

Whether the court of chancery has the power to remove an executor, upon a mere petition presented by some of the persons interested in the estate, and without the institution of a suit for that purpose? *Quære.*

The committee of a lunatic trustee, or of a lunatic executor, is entitled to notice of an application to the court to remove such trustee or executor. And if the alleged lunatic has no committee, the court will direct the application to stand over until a committee shall have been appointed.

THIS case came before the chancellor upon the petition of James S. Wadsworth and Elizabeth Wadsworth to remove W. W. Wadsworth as one of the executors and trustees under the will of his father, and to appoint another trustee in his place, so far as related to the trust created for the benefit of the petitioner E. Wadsworth. The testator, after making various specific devises and bequests of portions of his real and personal estate, devised one-fourth of his residuary real estate to his two sons J. S. Wadsworth and W. W. Wadsworth and to his son-in-law M. Brimmer, and to their successors, as trustees of his daughter Elizabeth; in trust to receive the rents, profits and income thereof for her separate use, with remainder to her issue, if she should leave any at her death; and if she should die without issue, then to the other heirs at law, of the testator, in fee. And the trustees were authorized to lease the real estate embraced in the trust, for terms not exceeding twenty-one years, or to sell the lands and re-invest the proceeds in other lands, or in public stocks, or bonds and mortgages upon the same trusts; the cestui que trust assenting to such sales by joining in the conveyances of the lands. He also bequeathed one-fourth of his residuary personal estate to the same trustees; in trust to receive and pay over the income thereof to his daughter Elizabeth for life, with power to her to dispose of the principal thereof by will at her death, and with power to the trustees to convert it into real estate, during her lifetime; to be held by them upon the same trusts.

He devised one other fourth of his residuary real estate to the same persons, as trustees for his grandson M. Brimmer, junior, the only child of his deceased daughter, upon similar trusts

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as in the case of his daughter Elizabeth ; with power to accumulate the rents, profits and income during the minority of his said grandson ; and limiting the remainder in fee in the same manner. And he bequeathed one-fourth of his residuary personal estate to them, in trust for the use of such grandson until he should arrive at the age of twenty-one, and then to pay over the capital to him.

He also appointed his two sons and his son-in-law, the executors of his will. And he directed and empowered them, or the survivor or survivors of them, to fulfil all contracts made by him for the sale of lands, and to execute conveyances to the purchasers, upon the receipt of the purchase moneys due upon such contracts. He also bequeathed to his executors \$10,000 in bank stock, in trust to receive and apply the dividends thereon, for two years, to the improvement of common schools in this state ; and after that time, either to continue the application of the dividends for that object, so long as they should think proper, or to sell the stock and divide the proceeds among his heirs.

The testator died in 1844, and all the executors proved the will and took upon themselves the execution of the trust as such executors. All the trustees also accepted the special trust as to the one-fourth of the residuary real and personal estate devised and bequeathed in trust for the benefit of the grandson of the testator ; but M. Brimmer, one of the trustees, refused to accept the trust as to the one-fourth of the residuary real and personal estate devised and bequeathed in trust for the use and benefit of the testator's daughter E. Wadsworth, and that trust therefore devolved upon the other trustees, the testator's two sons ; who assumed the execution thereof. In 1846, W. W. Wadsworth became of unsound mind, and was found to be a lunatic upon a commission issued to inquire into the fact. Upon the presenting of the petition for the removal of the lunatic, as executor and trustee, the chancellor directed it to stand over until a committee of the person and estate of the lunatic should be appointed, and that such committee should have notice of the application. Notice of the application was given

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accordingly, and the petition was in readiness for hearing and decision before the first Monday of July, 1847; but after that time, and before the actual hearing of the parties, M. Brimmer, one of the executors, and one of the trustees of the residuary property bequeathed to the grandson of the testator, died.

T. Sedgwick, for the petitioners.

B. D. Silliman, for the committee of the lunatic.

THE CHANCELLOR. The common law has made no provision for the execution of a joint trust by one of the trustees, where the co-trustee, by reason of lunacy or other inability, becomes incompetent to execute the trust. This, therefore, appears to be a proper case for the interposition of the court to remove the lunatic trustee, under the provisions of the revised statutes; so that the trusts both as to the residuary estate given to the daughter, and as to that given to the grandson of the testator, may be executed, either by the remaining trustee, or by him and such other person as may be substituted in place of the lunatic. So far as relates to the removal of the lunatic trustee from both of these trusts, the case was in readiness for a hearing before the chancellor previous to the first Monday of July last. And it was also in readiness for the substitution of a new trustee in the place of the lunatic, so far as related to the trust for the benefit of E. Wadsworth.

Where a single trust is created it is not competent for the court to remove one of the trustees from a part of the trust, and to appoint another in his place to act with the co-trustee in part only. But in this case, although both trusts were given to the same persons originally, the testator appears to have intended to create separate and distinct trusts in relation to the portions of the residuary estate conveyed in trust for the use of his daughter and grandson respectively. And both were separate and distinct from the trusts, and trust powers, which the testator intended to confer upon the same persons in their character

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of executors. Brimmer, therefore, was authorized to decline the trust attempted to be conferred upon him, as a trustee of the residuary estate given to the testator's daughter, and at the same time to accept the trust as to the fourth of the residuary estate devised and bequeathed to the testator's grandson; and also to take out letters testamentary and assume the duties of an executor.

So also the lunatic may be removed, as one of the trustees of each of the special trusts, without interfering with the trust conferred upon him as one of the executors of the testator's will. And I think the counsel for the committee is right in supposing that there is nothing in this case rendering it proper for the court to remove the lunatic as one of the executors of his father's estate; even if the court of chancery has the power to remove an executor upon a mere petition, presented by some of the persons interested in the estate, and without the institution of a suit for that purpose; which power is at least doubtful. (See *Van Wyck's case*, 1 Barb. Ch. Rep. 565.) From the facts admitted by the petitioners it is rendered very probable, that the derangement of W. W. Wadsworth is only temporary; and that he will in time be entirely restored to the possession of his mental faculties, as they existed previous to the fall which caused his lunacy. And the statute has made ample provision for the case of the lunacy of one executor or administrator, where there are others in existence who are competent to act; by authorizing the latter to proceed and execute the duty alone. (2 R. S. 78, § 44.) The petitioner, J. S. Wadsworth, by the death of one of his co-executors and the lunacy of the other, is for the time being the sole executor of his father's will, and is authorized alone to execute the trusts thereof. And he may also execute the power in trust, devised by the testator to his executors, to give conveyances for lands which the testator had contracted to sell in his lifetime.

So much of the petition, therefore, as prays for the removal of the lunatic from the executorship must be denied. But so much thereof as seeks to remove him, as trustee, from each of the special trusts before referred to, must be granted; as those

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trusts cannot be executed during his lunacy without removing him as one of the trustees. And as the new trustee, proposed by the petitioners, appears to be competent and responsible, so as to protect not only the interest of the cestui que trust, but also the contingent interest of those whose remainders in fee may be affected by the power to sell and re-invest the trust property, the order will direct that he be substituted as the trustee, in the place of the lunatic, in relation to the trust of the one-fourth of the testator's residuary estate devised and bequeathed for the use and benefit of Elizabeth Wadsworth for life.

Martin Brimmer, the other trustee of the one-fourth of the testator's residuary estate devised and bequeathed for the use and benefit of the grandson, was not dead on the first Monday of July last; and the petition, which was presented previous to that time, did not ask for the appointment of a new trustee, in the place of the lunatic, in reference to that trust. If this subsequent event, therefore, renders the appointment of a new trustee in the place of the lunatic desirable, in relation to that trust, the chancellor has no jurisdiction to make that appointment; but an application for that purpose must be made to the new supreme court. The order therefore will merely direct the removal of the lunatic from that trust, without substituting another in his place; leaving the petitioner J. S. Wadsworth to execute that trust as the sole surviving trustee. But the order must specify that it is to be without prejudice to the right of Brimmer, the cestui que trust, or his guardian, or any other person interested in the due execution of that trust, hereafter to apply to the supreme court, in equity, to appoint a new trustee in the place of the lunatic who is removed by such order of the chancellor; the applicant for such appointment giving due notice to the surviving trustee, and to the committee of the lunatic and other persons interested in such appointment.

Order accordingly.

Wood and others vs. BYINGTON.

[Distinguished, 82 N. Y. 555, 559, 560. Doubted, 3 Redf. 97.]

The 13th section of the title of the revised statutes relative to the sale of the real estate of a testator or intestate, is not applicable to a decree in chancery against administrators, after the death of their intestate; so as to make such decree conclusive evidence of the indebtedness of the decedent, as against the heirs and other persons interested in his real estate, upon a proceeding before the surrogate for the sale of such real estate to pay debts.

But a decree against the administrators is conclusive evidence of the indebtedness, as against them, upon the hearing before the surrogate on the preliminary order, requiring them to show cause why they should not be ordered to mortgage, lease, or sell the real estate of the intestate, for the payment of his debts.

The administrators are estopped, by such a decree, from alleging that the debt was not due at the time the decree against them was rendered; or from insisting that the claim of the creditor was barred by the statute of limitations, previous to the commencement of the suit in which the decree was entered.

A decretal order in a suit in chancery, made during the life of the defendant in such suit, establishing a partnership between him and the complainant, and directing an account to be taken between them in reference to the partnership transactions, is conclusive evidence against the heirs of such defendant, as well as against his personal representatives, upon a proceeding before the surrogate for the sale of the real estate of the deceased defendant, for the payment of his debts—not only of the existence of the partnership but also of the right of the complainant in that suit to call him to account; and also that such right was not barred by the lapse of time, or otherwise, at the time such decretal order was made.

Although a suit in chancery abates, by the death of one of the parties, after the making of a decretal order therein, directing an account to be taken between the parties, the rights established by such decretal order are not lost, or impaired, by such abatement of the suit.

The act of April, 1843, to amend the act concerning the proof of wills, &c. was not retroactive in its operation; so as to make a decree against administrators which had been obtained previous to its passage for a debt due by their intestate, prima facie evidence of the amount of the debt as against the heirs and other persons interested in the real estate of the intestate.

Whether the legislature can rightfully declare that the result of a litigated suit against one person shall be evidence against another, to affect rights of the latter which had accrued previous to the passage of the statute? *Quære.*

The act of April, 1843, does not charge the real estate of a decedent with the costs of the suit in which a judgment, or decree, against his personal representatives has been obtained. It only makes the judgment, or decree, presumptive evidence of the existence and of the amount of the debt due from the decedent; for the purpose of an application to the surrogate for an order to sell the real estate.

That statute does not authorize the surrogate to direct the sale of real estate of a

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deceased debtor to pay costs which had not been awarded, to the creditor, against the decedent, at the time of the death of the latter.

Upon an application to a surrogate, by a creditor whose debt has been liquidated by a decree in chancery, for the sale of the real estate of a deceased debtor, parol testimony cannot be received to show upon what evidence the master based his decision as to particular items of the account, on the reference to take an account in the suit in which the creditor's decree was obtained. But to rebut the *prima facie* evidence of the correctness of the master's decision, the whole evidence before him should be produced.

THIS was an appeal, by the heirs and tertenants of T. M. Wood deceased, from an order of the surrogate of the county of Onondaga, establishing a debt against the estate of the decedent, and directing the surviving administrator to sell certain real estate, of which the intestate died seised, for the payment and satisfaction of that debt.

The respondent, in 1825, filed his bill in the court of chancery against T. M. Wood, the decedent, for an account and settlement of certain partnership transactions arising out of a copartnership which had existed between the parties some years before that time. The cause was heard upon pleadings and proofs. And in October, 1833, the vice chancellor of the fifth circuit, to whom the cause had been referred for hearing and decision, made a decree establishing the partnership, and directing that an account should be taken between the parties in reference to the partnership transactions; and giving special directions as to the manner of taking the account, and the mode of charging interest, and directing that each party should be charged with such portions of the real estate as he had sold or taken the exclusive possession of, for his own use and benefit; reserving all other questions and directions until the coming in of the master's report. That decree was affirmed by the chancellor, upon appeal, with a slight modification. And Wood, the defendant, having died in 1836, after the argument but before the decision of the chancellor upon that appeal, the decree of affirmance was directed to be entered *nunc pro tunc* as of the time of such argument.

Letters of administration were granted upon the estate of the decedent in February 1836, and the cause was subsequently

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revived against the administrators. Upon the taking of the account before the master, which commenced in October, 1837, the administrators appeared and litigated the matter. And they excepted to the master's report, and to his further report, and were heard before the vice chancellor upon those exceptions, and upon the equity reserved in the decree of October, 1833, and before the chancellor upon one appeal to him from the decision of the vice chancellor on exceptions to the master's report. The balance found due from the decedent upon that accounting, as settled by the vice chancellor, upon exceptions to the master's amended report, and affirmed by the chancellor upon appeal, was \$4,869,02, with interest from the first of May, 1839; which was the date of the master's first report. For that amount, together with the costs of the suit, the vice chancellor made a decree against the surviving administrators, on the 2d of May, 1843; and he directed the amount of the debt, interest, and costs to be paid and collected from the personal estate of the intestate in the hands of his surviving administrators. The costs of the suit, previous to the death of T. M. Wood, were taxed at \$254; and the costs subsequent to that time at \$550,58.

The respondent being unable to collect his decree of the surviving administrators, applied to the surrogate, in September, 1843, for an order that they should show cause why they should not be directed to sell certain real estate of which the intestate died seised, to pay the amount of the decree. Upon the return of the citation the administrators appeared and objected that the decree was not evidence of an indebtedness for which they could be required to sell real estate; and made various other objections which were overruled by the surrogate. And the usual order was thereupon made, directing all persons interested in the real estate of the intestate to show cause why authority and directions should not be given to the administrators to sell. Upon the return of the citation, the heirs and occupants of the lands appeared by their counsel, and the claimant then produced in evidence the enrolled decree. The counsel for the appellants thereupon objected that the decree against the administrators was not evidence

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against the persons interested in the lands, so as to authorize the surrogate to make an order of sale. They also alleged that the respondent's debt had been paid; that the decree was obtained by fraud; that the claim was barred by the statute of limitations before the commencement of the suit, against the intestate, in the court of chancery; that the time for applying to the surrogate had elapsed before this application was made; that an order was made and published in August, 1836, requiring the creditors to exhibit their claims against the estate of the decedent, on or before the fourth Monday of February, 1837, and that the respondent never presented any claim to them; that they had obtained two orders for the sale of real property of the decedent, for the payment of debts, and had brought the proceeds of the sales into the surrogate's office for distribution, and that the surrogate had given due notice to the creditors to appear before him, in December, 1842, and exhibit and prove their claims against the estate, for the purpose of enabling him to make a distribution of the proceeds of such sales among the creditors; and that the respondent did not appear and prove his demand or make any claim therefor; that in 1841, the accounts of the administrators were finally settled before the surrogate, as to the administration of the personal estate; on which occasion all the creditors were duly notified to attend such settlement, but the respondent did not attend to make any claim; and that the rights and interests of several of the heirs to the lands of the intestate had been sold and conveyed to bona fide purchasers before the institution of these proceedings.

The counsel for the appellants thereupon offered to prove, by testimony not produced before the master, that the statement of the accounts by the latter was incorrect, and that the claims allowed by him were not valid claims against the estate of the intestate. And the surrogate, after hearing counsel for the several parties, decided that as against the heirs and other persons interested in the estate of the decedent upon this proceeding, the decree was only *prima facie* evidence of the indebtedness, and that they were at liberty to introduce proof to impeach it. Both parties then introduced evidence in relation to the contest

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ed items of the account. And the surrogate thereupon decided and decreed that the estate of the deceased was indebted to Byington on the 24th of September, 1845, the day of the date of that decree, in the sum of \$7,973,64. This amount included the whole debt and costs and interest decreed by the vice chancellor to be paid, including the interest on the costs from the 25th of July, 1843, when those costs were taxed. And the decree or order of the surrogate directed G. Lawrence, the then sole surviving administrator, to sell certain real estate of the intestate, described in such order, to satisfy the debt declared by the surrogate to be due to the respondent.

G. Lawrence, for the appellants.

J. R. Lawrence, for the respondent.

THE CHANCELLOR. The first question for consideration, in this appeal, is, as to the effect of the decree in chancery, of May, 1843, as evidence of the indebtedness of the intestate, as against the heirs and other persons interested in his real estate. The counsel for the respondent is wrong in supposing that the 13th section of the title of the revised statutes, relative to the sale of real estate of a testator or intestate, (2 R. S. 102,) is applicable to this case; so as to make the decree of the vice chancellor conclusive evidence of the indebtedness of the decedent, as against the persons interested in his real estate, upon a proceeding before the surrogate for the sale of such real estate to pay his debts. That section is in terms limited to judgments recovered against executors or administrators in courts of law. The decree, however, was conclusive evidence of the indebtedness, as against the administrators, on the hearing upon the preliminary order, requiring them to show cause why they should not be ordered to mortgage, lease, or sell the real estate for the payment of the debts. None of the objections made by them, therefore, upon the hearing on that preliminary order for the administrators to show cause, were well taken. For, by the decree in the chancery suit, they were estopped from

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alleging that the debt was not due at the time of the decree against them, or that the respondent's claim was barred by the statute of limitations before the chancery suit was commenced.

And, against the heirs and other persons interested in the real estate of the intestate, the enrolled decree, even if it was not *prima facie* evidence of the indebtedness, was properly received in evidence by the surrogate. For the decretal order of October, 1833, made in the lifetime of the intestate, was conclusive evidence against his heirs, as well as against his personal representatives, not only of the existence of the partnership but also of the right of the complainant to call him to account; and that such right was not barred by lapse of time, or otherwise, at the time that decretal order was made. It likewise settled the principles upon which the account was to be taken between the parties. So that if the present proceedings had been instituted previous to the revival of that suit against the administrators, the surrogate, in ascertaining the indebtedness of the intestate, would have been bound to take the account between the parties upon the basis of the decretal order of October, 1833. For, although the suit abated by the death of the defendant, the rights established by that decretal order were not lost or impaired by such abatement.

The proviso to the act of the 18th of April, 1843, to amend the act concerning the proof of wills, &c. (*Laws of 1843, p. 229,*) and which became a law on the eighth of May, in the same year, declares that a judgment or decree, against an executor or administrator, obtained upon a trial or hearing upon the merits, shall be *prima facie* evidence of the debt before the surrogate. It will be seen that this act went into operation six days subsequent to the final decree of the vice chancellor, against the administrators, and some months after the decree upon the exceptions, which finally determined the balance due from the intestate, to the complainant in the chancery suit, including the interest to the first of May, 1839. And the question is, whether this act of April, 1843, is retroactive in its operation; so as to make a decree which had previously been

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obtained against the administrators, *prima facie* evidence of the existence of the debt as against the heirs and others interested in the lands, who have had no opportunity to contest the suit; and who, during the pendency thereof, had no interest in the result. A statute so materially affecting the rights of third persons, who were mere strangers to the suit, ought to be construed strictly. Indeed, it is a matter of doubt whether the legislature can rightfully declare that the result of a litigated suit against one person shall be evidence against another, to affect rights of the latter which had accrued previous to the passage of the statute establishing such a rule of evidence. I therefore conclude, in this case, that the decree against the administrators, before the act of April, 1843 took effect as a law, was not even *prima facie* evidence of the amount of the debt, as against those who were interested in the real estate of the decedent.

Rejecting the decree, however, even as *prima facie* evidence of the state of accounts between the complainant in that suit and T. M. Wood, and having reference to the decretal order of October, 1833, merely as establishing the right to an account, and the principles upon which that account was to be taken between the parties, I think there was sufficient evidence before the surrogate, to show that the balance due to the respondent, was as much as was finally allowed in the chancery suit; including the interest as it was directed to be computed by the decretal order of 1833.

The surrogate erred, however, in including the costs of the chancery suit, and the interest upon those costs, as a part of the debt due to Byington; for the payment of which the administrator was to be directed to sell real estate. At the time of the death of T. M. Wood no decree had been made establishing the right of the complainant Byington to costs. The act of April, 1843, does not charge the real estate with the costs of the suit in which the judgment or decree against the personal representatives is obtained; but merely makes the judgment or decree presumptive evidence of the existence and the amount of the debt due from the testator; for the purposes of

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the application to the surrogate for an order of sale. It may be perfectly equitable and just that the costs of the litigation with the executor or administrator, and also those incurred in the lifetime of the decedent, should be charged on the real estate ; where they have been awarded against his personal representatives ; to be paid out of the estate in their hands. But the statute has not authorized the surrogate to direct the sale of real estate to pay costs, which had not been awarded to the creditor, against the decedent, at the time of his death. For these reasons, the sum of \$926,60, being the amount of the costs and the interest thereon from the time of taxation, which the surrogate erroneously included as a part of the debt due from the estate on the 24th of September, 1845, must be deducted ; and the order appealed from must be so modified as to declare that a balance of \$7,047,04, only was due, at the last mentioned date.

The surrogate was right in refusing to permit parol testimony to be given as to the particular evidence upon which the master based his decision as to certain items of the account. If these appellants wished to show what testimony was given before the master, they should have called for all the evidence before him ; as the same was taken down and certified to the court, upon the hearing of the exceptions. And the testimony of the administrator was properly rejected ; because it appeared that he was interested in resisting the application—he having guarantied the payment of the bond and mortgage upon the premises which he had assigned.

The neglect to report the debt to the administrator, is not a bar to the proceedings against the lands of the decedent, and the subsequent decree in the chancery suit was conclusive evidence that the complainant's demand was not barred as against the administrators. Neither does there appear to have been any irregularity in the taking of the testimony.

The order appealed from must, therefore, be modified as to the amount, in the manner before suggested ; and in all other respects it is to be affirmed. Neither party is to have costs as against the other, upon this appeal. The decree is to be enter

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ed nunc pro tunc, as of the time when the answer to the petition of appeal was filed, and the proceedings are to be remitted to the surrogate of the county of Onondaga.

Dodd and others, ex'rs, &c. vs. Astor.

A motion once made and denied upon the merits, without reserving the right to renew it, cannot be made a second time, without leave of the court.

After an order of a vice chancellor, denying an application upon the merits, has been affirmed by the appellate court, it is erroneous for him to permit the former motion to be renewed and to grant the application.

A complainant will not be allowed to amend his bill so as to make a new case, after the proofs in the cause have been taken and closed.

THIS case came before the chancellor upon an appeal, by the complainants, from an order of the vice chancellor of the first circuit, denying their application for leave to amend the bill filed in this cause. The bill was filed by Moses Dodd, the testator of the complainants, for the specific performance of an agreement, made about thirty years previous to the filing of the complainant's bill, to execute a lease for the term of twenty-one years, from the 1st of May, 1814, with the privilege of two renewals. The bill, which was sworn to, contained many other particulars of the alleged contract; all of which were denied in the answer of the defendant. And the answer set up an entirely different contract; a contract for a lease for twenty-one years from the 1st of May, 1813, with the privilege of only one renewal; and which lease was to be given only upon the payment of certain moneys advanced by the defendant to the complainant. The original complainant died before the coming in of the answer, and the suit was revived by his executors; who afterwards filed a replication to the answer, and proceeded to take proofs in the cause. The proofs were regularly closed, and the cause was about to be heard upon pleadings and proofs, when the complainants, finding that they could not

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establish the alleged contract set out in their bill, made an application for leave to amend the bill of their testator, by stating therein the making of such a contract as was set forth in the defendant's answer. The vice chancellor denied the application, and his decision was affirmed by the chancellor upon appeal. The complainants, thereupon, and without having obtained any leave to renew the motion, either upon the denial of the original motion by the vice chancellor, or upon the affirmance thereof by the chancellor, made a new application to amend, so as to make their bill conform to the answer of the defendant in the statement of the contract. The vice chancellor denied this last application, with costs; and from that decision the complainants have now appealed to the chancellor.

D. Marvin, for the appellants.

J. Miller, for the respondent.

THE CHANCELLOR. The application of the appellants was properly denied, upon the ground that it was in substance a renewal of a former application, without leave of the court; after such former application had been denied, upon the merits, without reserving the right to renew the motion to amend upon a new state of facts.^(a) Indeed the former application was denied upon the same facts, substantially. For although the solicitor of the complainants had discovered that there were some technical defects in the papers upon which the first application was founded, the affidavit of the defendant's solicitor showed that no objection, upon that ground, was made either before the vice chancellor or on the hearing before the chancellor upon the appeal. It would therefore have been erroneous for the vice chancellor to grant the second motion, after his former order denying the application upon the merits had been affirmed by the appellate court.

(a) See *Willet v. Fayerweather*, (1 Barb. Sup. Court Rep. 72, 73.)

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Again ; there is nothing in the case rendering it proper that the extraordinary relief asked for should be granted in this stage of the suit. And from an examination of the pleadings and proofs, I am satisfied that the complainants ought not to succeed, even if the bill is amended, in the manner asked for in the petition, by striking out the whole statement of the contract as sworn to in the bill and substituting the contract stated in the answer. The last mentioned contract the complainant refused to perform, although the defendant offered him a lease upon the terms in that contract mentioned. And having assigned his interest in the premises, for the benefit of his creditors, in connection with his other property, more than twenty years before the filing of his bill, and allowed the defendant to use the premises as his own, and in hostility to the claim of the assignees, for fourteen or fifteen years, the right to file a bill for a specific performance was barred, both as against him and against his assignees, to whom the assignment was made in 1821.

The revised statutes have limited the right to file a bill in equity, when the jurisdiction of the court is not concurrent with that of courts of law, in relation to the relief sought, to ten years after the right to file a bill accrued. Here the testimony conclusively shows that more than ten years before the filing of the bill, the defendant Astor was not only in the undisturbed possession of the premises, claiming them as his own, but that he had for considerably more than ten years refused to recognize any right or interest of the complainant or his assigns in the premises, either at law or in equity, or to any part of the rents or profits thereof. The claim was therefore barred by the statute of limitations before the re-assignment of the premises to Dodd. And that re-assignment was also void ; because it was an attempt to transfer a claim to real estate, held adversely to such claim, and for the purpose of litigation merely. No interest whatever passed to the original complainant in this suit by virtue of the re-assignment ; and he could not sustain a bill for relief founded thereon. It was upon these grounds, as well as upon the principle that it was improper to

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allow the complainant to amend his bill, so as to make substantially a new case, after the parties had taken their proofs in the cause, that I affirmed the order of the vice chancellor denying the first application.

The order appealed from in the present case, must therefore be affirmed with costs.

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A decree for a partition cannot be made unless all the persons interested in the premises are made parties to the suit.

A grant of lands is void, and passes no title whatever to the grantee, if at the time of the delivery of the conveyance of such lands, they are in the actual possession of a third person claiming under a title adverse to that of the grantor.

A party applying for a partition of lands must not only have a present estate in the premises, of which partition is sought, as a joint tenant or a tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises.

It was the intention of the revisers to exclude a party from instituting a partition suit, for the partition of premises held adversely to him, until after he had obtained possession of his share of the premises, or some part thereof, by ejectment or otherwise.

Where a bill is filed for a partition of premises which are held adversely to the complainant, but there is nothing in the bill showing the adverse possession, the defendant must set up that defence by plea or answer.

But it is not necessary for the defendant to set up the defence of adverse possession specially, in his answer, or by plea, where the fact that the premises are held adversely to the complainant, is distinctly stated in the bill itself.

The proper course for the court, where the lands of which partition is sought are held adversely to the complainant, is to dismiss the bill, as prematurely filed; but without prejudice to the complainant's right to institute a new suit, for the partition of the premises, after he shall have obtained possession of his undivided share, or interest therein, by a recovery in an ejectment suit, or otherwise.

Rents or profits of premises sought to be partitioned, accruing while the land has been held adversely to the claim of the complainant, even if such rents and profits have been received by one who was a joint owner of the premises with the complainant, are not recoverable in the court of chancery, upon a bill for partition. They are more properly recoverable as mesne profits, in an ejectment suit brought for the recovery of the possession of the undivided share of the premises claimed by the plaintiff.

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THIS case came before the chancellor upon an appeal from a decretal order of the late vice chancellor of the fourth circuit. In September, 1827, Cornelius Burhans the elder died, leaving his second wife, Anna Burhans, surviving, and five children by her, and six by his first wife, and four grandchildren, who were the issue of another child by his first wife, his only heirs at law. The bill in this cause was filed by some of the children and grandchildren, the issue of the first wife of the decedent, against the widow, and the four surviving children by the second wife, for a partition of the real estate of the testator, and for an account of the rents and profits thereof, received by the defendants Anna Burhans and Ira Burhans, since the death of Cornelius Burhans; and also for an account of the personal estate of the decedent which had come to their hands. And all the other descendants of the decedent, and other persons interested in his estate, were made parties to the suit. The complainants claimed title to undivided portions of the real and personal estate under a deed from the decedent, dated in January, 1817, to all his children who were then in existence, and to the issue of his son Peter who was then dead. And the bill alleged that immediately after the death of Cornelius Burhans, his widow, and Ira Burhans his eldest son by her, took possession of all the real and personal estate, mentioned in the deed of January, 1817, and that at the time of the filing of the bill in this cause, they continued to hold and possess the same, to the exclusion of the complainants, and had applied the personal property, and the rents and profits of the real estate, to their own use, and refused to account for the same, or any part thereof, to the complainants. The bill further stated that the defendants Anna Burhans and Cornelius Burhans, pretended to have taken possession of such real and personal estate, under an alleged will of the decedent, devising and bequeathing his real and personal estate to his widow and his children by her. But the complainants charged in their bill, that if any such will was made by the decedent, it was made by him when he was incompetent to dispose of his property by will.

The widow, and the decedent's children by her, except one

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who died shortly after the death of his father, unmarried and without issue, put in their answers denying the due execution of the deed of January, 1817, and alleging that it was obtained from the decedent by fraud, and when he was incompetent to execute a will. They also insisted upon the due execution of a will, by him, about the first of September, 1827, by which he devised and bequeathed to his widow all his real and personal estate, during her widowhood, or until his youngest child by her, who was then about six years old, should arrive at the age of twenty-one; with a limitation over in fee to his sons by her, they paying a legacy to his daughter by her; and that the will also contained a provision that in case of the death of either of the devisees without issue, the share of such devisee should go to the survivors and to their sister of the full blood. And they admitted that under and by virtue of such will, the defendant Anna Burhans, immediately after the death of her husband, went into possession of the real estate in question, claiming title as a devisee thereof; and had continued to hold the same, to the exclusion of the complainants, and had received the rents and profits thereof for her own use, and for the support of her children, according to the provisions of the will. The answer further stated that the will was duly proved before the surrogate, shortly after the death of the testator, and that letters testamentary thereon were granted to the widow, as executrix, and to Ira Burhans, one of the executors named in the will; which executrix and executor thereupon took possession of the personal estate which was in the possession of the testator at the time of his death. The other defendants, except those who were infants, suffered the bill to be taken as confessed, and the infants put in a general answer by their guardian *ad litem*. Replications were filed and proofs taken in the cause. Before the proofs were closed, the bill was dismissed as to the defendant John C. Burhans, one of the grantees named in the deed of January, 1817; and he was examined as a witness for the complainants. But his testimony was suppressed by an order of the court. The cause was heard before the vice chancellor, upon pleadings and proofs. He directed the bill to be

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dismissed, so far as it sought for an account of the personal estate. And he ordered that so far as it sought a partition of the real estate, and an account of the rents and profits thereof, the suit should stand over, to give the complainants an opportunity to bring an ejectment to recover possession of the premises; to the end that if the deed of 1817 should be established, and the will of 1827 invalidated, partition might be decreed on further application to the court. He further directed, that if such ejectment suit was not brought within three months, the complainants' bill should be dismissed, with costs.

The defendant Anna Burhans, and her four surviving children, appealed from so much of the decree as directed the cause to stand over, to enable the complainants to bring an action of ejectment; with a view to a partition if they should be successful in the ejectment suit.

The following opinion was delivered by the vice chancellor

WILLARD, V. C. The main object of the bill in this case is to obtain partition of the real estate which it is alleged Cornelius Burhans, the ancestor of all the parties, by a deed bearing date the 4th of January, 1817, for the consideration of natural love and affection, conveyed to his children. A part of those grantees are the children of the said Cornelius by a former marriage, and four of them are children by his then wife, Anna Burhans, now his widow, who is also made a party defendant. After the date of that deed, the said Cornelius had another son by his said wife, Winslow Paige Burhans, who is still an infant, and is also a party defendant.

The widow of Cornelius Burhans, and his children by the second marriage, resist the partition. They deny the validity of the deed of the 4th of January, 1817; and they set up that the said Cornelius, before his death, to wit, on the 31st of August, 1827, duly made and published his last will and testament, whereby he devised his real estate to his four sons by the second marriage, to wit: Ira, William, Amy, and Winslow Paige, and charged them with the payment of a legacy of \$600, and an outset of \$150 to their sister Jane Catharine:

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The will also made provision for his widow, and discharged the children by the former marriage of all claims against them for advances.

The bill is so drawn that this will is put in issue by the pleadings. All the children by the second marriage were infants when the deed of 4th of January, 1817, is alleged to have been made, or have been born since that time, and in fact were still infants when the will of the 31st of August, 1827, was published, and some were still infants at the putting in of the answer. The said Cornelius Burhans died soon after the date of his will, and it was duly admitted to probate, by the surrogate of Albany, on the 20th of November, 1827, and letters testamentary were granted thereon to Anna Burhans, (the widow,) and Ira Burhans, (one of the sons by the second marriage,) two of the executors named in said will, on the same 20th of November, 1827.

The answer alleges that the said Cornelius Burhans continued in the actual possession of the real and personal estate, after the deed of the 4th of January, 1817, up to the day of his death, claiming to be and was in fact the owner of it. The bill admits that he continued in the possession till his death, but alleges that it was under a verbal permission given by one of the grantees of the deed at the time it was executed.

A preliminary motion was made, by the counsel for the complainants, to strike out all the testimony on the part of the defendants which arises from the admissions of Cornelius Burhans, made after the deed of the 4th of January, 1817; upon the familiar principle that the confessions of a grantor, made subsequent to his grant, shall not be given in evidence to defeat it. This principle is not applicable to the present case. All the parties are volunteers claiming under Cornelius Burhans, the common source of title. None of them are purchasers for a consideration. The original validity of the complainants' deed is not admitted, but denied; and a possession in the grantor, in apparent hostility to that deed, is shown for over ten years, and the grantor in fact died in quiet and actual possession of the same premises. And that the possession as well as title of

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the grantor, *prima facie*, devolved upon his widow and the devisees named in his will, who were then in possession as members of his family, are facts in substance asserted by the defendants, who defend under the will. Under these circumstances the declarations as well as acts of Cornelius Burhans, while in possession, were admissible in evidence, not only to characterize the nature of his occupancy, but also in connection with other facts to invalidate the grant itself. If they are admissible for any purpose, and to any extent, they are not to be suppressed; and the court will see that no improper use is made of them.

The defendants' counsel has also made a motion to suppress the deposition of John C. Burhans. He is one of the children of Cornelius Burhans by a former marriage, and is a grantee in the deed of January 4th, 1817. The deed is in fact in his handwriting, and he is the one who procured it to be executed. He was originally made a party defendant, and suffered the bill to be taken as confessed against him. On the day however that he was examined as a witness, an order was entered dismissing the bill as to him. This obviated the technical difficulty. But he still had an interest in upholding the deed of the 4th of January, 1817, and in defeating the will of August 31st, 1827. To remove this interest, he had previously, on the 8th of January, 1838, executed a release, or quit-claim deed, of all his right and title, interest, lien or claim and demand which he had to the estate, real and personal, of which Cornelius Burhans died seised or possessed, to Mahlon Wing, his heirs, executors and administrators. That deed purports to be for the consideration of two hundred dollars, the receipt whereof is acknowledged, and contains a covenant to execute such further conveyances as may be necessary to perfect said Wing's title to the property and estate thereby intended to be conveyed.

That deed, or release, does not restore the competency of the witness. It was made during the pendency of this suit, and near six years after its commencement, to a person not a party to the suit, and not in possession of the lands, and who never

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had been in possession, and by a person not in possession, and who never had been in the actual possession thereof. The subject matter of the grant forms the gravamen of the present controversy. The defendants, who claim under the will of 1827, were in the actual and exclusive occupancy of the premises, having succeeded to the possession of their devisor, who died in possession. The release therefore is void, as being against the statute of champerty. (2 R. S. 691, § 5.)

But there is another objection to its restoring the competency of the witness. It contains a covenant for further assurance. John C. Burhans has an interest that this court should sustain the deed of 1817; because in that event, if the deed is valid at all, it will convey to Wing a good title, and he will thus be relieved from his covenant. The testimony of John C. Burhans must therefore be suppressed.

This brings us to the question whether such a case is made, by the pleadings and proofs, as will warrant a decree in partition. The statute relative to the partition of lands, (2 R. S. 317, 1st ed.) evidently contemplates that a proceeding in partition is not to be carried on, except where the parties "*hold and are in the possession of lands,*" &c. It does not contemplate a case where the title of one or more of the parties is disputed. The statute, it is true, mainly relates to proceedings in the common law courts, and to partition in chancery by *petition*. It affords, however, a safe rule for all cases. The bill in this case is a proceeding at common law, and not under the statute. The jurisdiction of chancery, in awarding partition, is well established by a long series of decisions. But the court does not sustain the bill, unless the title is clear. In the case of *The Bishop of Ely v. Kenrick*, (Bunb. 322,) a bill for partition was dismissed because the title was denied. In another case, (*Cartwright v. Pultney*, 2 Atk. 380,) Lord Hardwicke observed, that where there were suspicious circumstances in the plaintiff's title, the court would leave him to law. These and other cases are approved by Chancellor Kent, in the early case of *Wilkin v. Wilkin*, (1 John. Ch. Rep. 111,) and the

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doctrine has never since been questioned. (*Cox v. Smith*, 4 *John. Ch. Rep.* 271. 3 *Id.* 302.)

The revised statutes made some alteration in partition cases; and although they mainly related to proceedings in common law tribunals, yet as far as applicable, they have been followed by this court. (2 *Paige*, 28.) In *Jenkins v. Van Schaack*, (3 *Paige's Rep.* 242,) the chancellor concedes that a suit for partition cannot be sustained, either at law or equity, where there has been an actual ouster by one tenant in common of his co-tenant, or where there has been an adverse possession. In such cases, he thinks the complainant must first regain possession by an ejectment. (See *Revisers' Notes* to §§ 1, 19; *Clapp v. Bromaghan*, 9 *Cowen*, 530.) The latter case was decided under the former statute, but the doctrine of the decision, so far as it is applicable to this question, is law at this time. The remarks of Chancellor Jones, who delivered the opinion of the court of errors, at page 560 and 561, are in point to show that an adverse possession of these defendants, who claim under the will of 1827, though for less than twenty years, is a bar to a recovery in partition.

That an adverse possession commenced as early as the entry by those who claim under the will of 1827, after the death of Cornelius Burhans, cannot with propriety be disputed. The moment such adverse possession commenced, the complainants and defendants ceased to occupy as tenants in common. There is no doubt, I think, that the claim of the defendants under the will of 1827, was such an ouster of those claiming under the deed of 1817, or by descent, as would have enabled the latter to maintain an ejectment. It was a denial of the tenancy in common. In short, it was a disseisin of their co-tenants.

This view of the matter forms a decisive objection to the complainants' right of recovery. It would be enough, to prevent a decree, to throw a doubt over the complainants' title. That their title is denied upon probable ground, is obvious to me. I shall not sift the evidence and pronounce upon it, as it does not become necessary for the discussion of this cause.

The remaining object of the bill is to obtain an account of

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the personal estate of Cornelius Burhans, deceased, and the rents and profits of the realty. The probate of the will of the 31st of August, 1827, is a decisive answer to this claim for the personalty. The probate is conclusive until reversed on appeal. The decision of the surrogate cannot be overhauled in this collateral way. If there is any remedy, it is in another forum. The rents and profits may depend upon the question of title.

I will let the cause stand over for a time to give the complainants, or any of the parties, an opportunity of bringing an ejectment for the premises in question. And in case such ejectment is brought within three months, the bill is to remain in *statu quo* until the decision of such ejectment, to the end that if the deed of 1817 is established, and the will of 1827 is invalidated, partition may be decreed; if otherwise, or if no suit is brought within three months, the bill to be dismissed with costs.

M. T. Reynolds, for the appellants. 1. The defendants Anna Burhans, and those holding under the will of Cornelius Burhans, being in possession at the time of filing the bill, and for many years previous, and holding openly adverse to and exclusive of the complainants, the latter are not entitled to demand a partition; whatever may be their true title. 2. The bill having been dismissed as to John C. Burhans, who by the bill is declared to be a tenant in common, no decree in partition can be made in this suit; whatever may be the result of the suit in ejectment. 3. The circumstances under which the pretended deed of gift was obtained were such, as not to render it proper that a court of equity should lend its aid to the complainants, but to leave them to their remedy at law.

B. R. Wood, for the respondents. 1. The assertions of Cornelius Burhans, the grantor, cannot be received to invalidate his own deed. The law is, that declarations must be accompanied with some act. It is after all the act, not the declaration. 2. At the time the deed was executed, he knew its nature and was competent to make it. There is no pretence that it

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was intended as a will, or that he thought he was making one. To make it such, it should contain some clause showing it inoperative until after the death of the person making it. That he knew the nature of the instrument, is fully proved, and is not disproved by a single assertion he ever made. 3. He, the grantor, considered it a valid deed, and acted under it as such in negotiating with his children and paying them money. Though at times, for the sake of peace with his wife, he made some stir in the matter, yet he never intended to invalidate that deed. 4. But whether competent or not, if the grantor, with a knowledge of this deed and of the course necessary to be taken to set it aside, neglected to do so in his lifetime, it cannot be done for him now by others. And unless it can be shown that the complainants have all released their interest, it is valid as to them. There is no proof of such release. 5. The court should retain the cause until the trial of the ejectment suit, on the defendants paying the costs of appeal.

THE CHANCELLOR. It is very evident from the state of the pleadings, and the facts as they appear in evidence, that no decree for a partition can be made in this cause, even if the complainants should succeed in recovering the possession of an undivided portion of the premises in an ejectment suit. If the deed of 1817 was valid, John C. Burhans was entitled to one undivided eleventh part of the premises in question, under that deed, and to one undivided eleventh of another eleventh, as one of the heirs at law of his half-brother William. No partition, therefore, could be made in a suit to which he was not a party. And the complainants having voluntarily dismissed their bill as to him, cannot obtain a decree for partition in this suit as to any of the other defendants. For, at the hearing, those defendants will have a right to insist that all the necessary parties are not before the court, to enable the court to decree a partition between them. Even if the deed from John C. Burhans to one of his co-defendants, which was given after the issue was joined in this cause, had purported to convey the interest in the premises which he acquired under the deed of January

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1817, which it does not, no title whatever would have passed to the grantee in that deed. For it appears by the complainants' bill, as well as by the answers of the appellants, that at the time of the attempted conveyance from John C. Burhans, to one of his co-defendants, the whole of the premises were held adversely, not only to him but to Mahlon Wing, the grantee in that deed. And every grant of lands is void, and passes no title whatever to the grantee, if at the time of the delivery of the deed such lands are in the actual possession of a third person claiming under a title adverse to that of the grantor.

Again; the complainants, at the time of the commencement of the present suit, were neither actually nor constructively in possession of the premises of which partition is sought; but the whole of such premises were possessed and claimed under the will of Cornelius Burhans, adversely to the claim of the complainants as a part of the heirs at law of the decedent, as well as to their claim under the deed of January, 1817. Indeed, it is apparent from the evidence, that Cornelius Burhans, the elder, must have held and claimed the premises, adversely to the title supposed to have been obtained under the deed of 1817, for some years previous to his death. And the counsel for the appellants is right, in supposing that no decree for a partition can be made in this suit, which was commenced while the whole of the premises were held adversely to the title of the complainants; even if such complainants should succeed in the ejectment suit contemplated by the decretal order appealed from. The authority to commence a suit in the supreme court, for the partition of land, is contained in the first section of the title of the revised statutes, relative to the partition of lands owned by several persons. (2 R. S. 317.) And by another section of that title, the same authority is given to this court to decree a partition. The first section clearly contemplates that the party applying for partition must not only have a present estate, as tenant in common, or joint tenant, in the premises of which partition is sought, but must also be actually or constructively in the possession of an undivided share or interest in such premises. The language of the statute is,

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"where several persons shall hold *and be in the possession of* any lands, tenements or hereditaments, as joint tenants, or tenants in common, any one or more of such persons, being of full age, may apply for a division or partition of the premises." And the sixteenth section of the same title, authorizes any party appearing in the suit to set up, as a defence, that the plaintiffs, or any of them, at the time of the commencement of the suit, were not in possession of the premises, or any part thereof. (2 R. S. 320.) Whether this was a new principle introduced into the present revision of the laws, or was in accordance with the decision of the court for the correction of errors in *Clapp v. Bromagham*, (9 Cowen's Rep. 530,) it is not necessary now to inquire. For it is evident, from the revisers' notes to the first and seventeenth sections of this title of the revised statutes, as reported by them, that they intended to exclude a party from instituting a partition suit, for the partition of premises held adversely to him, until after he had obtained possession of his share of the premises, or of some part thereof, by ejectment or otherwise. In their note to the first section they say they have inserted the words "be in actual possession," to remove a doubt which existed upon the statute then in force; as explained more fully in their note to section seventeen. And in their note to the seventeenth section, which authorized the defendant to set up, as a defence, that the petitioners, or any of them, were not in possession of the premises, or any part thereof, at the time of the commencement of the suit, they say: "It is believed that the policy of the act will be promoted by requiring that the petitioners shall be actually in possession of some part of the premises." It is true, these two sections refer to proceedings for partition instituted by petition, in courts of law. But the eightieth section of the same title applies the same principle to suits for partition in this court; whether the suit here is instituted by petition or by bill.

In the case of *Jenkins v. Van Schaack*, (3 Paige's Rep. 242,) where there was nothing in the complainant's bill showing that the premises were held adversely to his claim, this court held that it was not necessary for him to aver that he was in pos-

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session of the premises of which partition was sought, as that fact would be inferred from the allegation that the parties were seised as tenants in common ; and that if the complainant had been ousted of his possession, or if the premises were held adversely, the defendant should set up that defence by plea or answer. That has been done in the present case by some of the defendants. It is not necessary, however, for the defendant to set up the defence of adverse possession specially in his answer, or by plea, where, as in this case, the fact that the whole premises are held adversely to the complainants is distinctly stated in the bill itself. The proper course for the court in such a case is to dismiss the complainant's bill as prematurely filed ; but without prejudice to his right to institute a new suit, for the partition of the premises, after he shall have obtained the possession of his undivided share or interest therein, by a recovery in an ejectment suit or otherwise:

The rents and profits of the premises accruing while the land has been held adversely to the claim of the complainants, even if such rents and profits had been received by one who was a joint owner of the premises with the complainants, are not properly recoverable in this court upon a bill for partition. Or rather, they would be more properly recoverable as mesne profits, in an ejectment suit brought for the recovery of the possession of the part of the premises claimed by the complainants. In the present case, however, they have not been received by either of the defendants who are alleged to be tenants in common with the complainants ; but by Anna Burhans the widow, who is not a tenant in common with any of the other parties. For she never was a tenant in common with the complainants, either under the deed of January, 1817, or as one of the heirs at law of Cornelius Burhans the elder. She entered into the possession of the premises, and has continued in such possession, as the devisee of her deceased husband, during her widowhood, or until her youngest child should have attained the age of twenty-one. And if she was not entitled to such possession, the remedy of the complainants, to recover the rents and profits received by her, is by a suit or proceeding at law ; after they shall have

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established their right to the possession of the premises, by an ejectment suit against her.

The part of the decree of the vice chancellor which is appealed from is therefore erroneous, and must be reversed with costs. And the part of the complainants' bill which seeks a partition of the premises and an account of the rents and profits thereof must be dismissed. And the complainants must pay to the defendants who have appealed, their costs of the suit to be taxed. But the dismissal of this part of the bill must be without prejudice to the right of the complainants, at law if they have any, to recover the possession of the undivided interests which they claim in the premises, and to recover the mesne profits thereof. And it must also be without prejudice to the right of the complainants to apply for a partition, after they shall have established their rights, as tenants in common, either in an ejectment suit or otherwise, or shall have obtained the actual possession of the premises, or of some part thereof, as such tenants in common.

 CLARKE and others vs. SAWYER and others.

[Affirmed, 2 N. Y. 498.]

Whether the court of chancery has jurisdiction to decree a will void, except by consent of parties, without awarding an issue *devisavit vel non*? *Quære*.

Where there is a want of jurisdiction in the court to declare a will void, upon a bill filed for that purpose, the bill should not be dismissed absolutely, so as to bar the complainant's rights; but it should be dismissed without prejudice to his rights at law.

Where a testator has been induced to make a will in consequence of a gross fraud practised upon him, by means of a conspiracy, the court of chancery has power, by consent of parties, to make a decree declaring the same void, and that it was obtained by fraud and imposition, so far as relates to the parties to the suit.

THIS was an appeal, from a decree of the assistant vice chancellor of the first circuit, dismissing the complainants' bill. The bill was filed by the two nieces of John Fisher deceased,

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to set aside an instrument 'purporting to be a will devising his real estate. The statement of the facts, in substance, is contained in the report of the case upon an appeal from the surrogate in relation to a probate of the same instrument as a will of personal property. (See *Clark v. Fisher*, 1 *Paige's Rep.* 171.)

W. Silliman, for the complainant.

D. S. Jones, for the respondent.

THE CHANCELLOR. I should have had some doubts as to the jurisdiction of this court to decree a will void without awarding an issue *devisavit vel non*, if all objection to the jurisdiction of the court had not been obviated by the consent of the parties. But even if there was a defect of jurisdiction, the bill should not have been dismissed absolutely, so as to bar the complainants' rights; but it should have been dismissed without prejudice to the rights of the complainants at law. The counsel for the parties, however, upon the argument, agreed that if the court should be against the respondents on the merits, a decree might be made in favor of the appellants without reference to the question of jurisdiction to make such a decree; but without prejudice to the right of the defendants to appeal therefrom, upon the merits, so as to make a final disposition of the matter in controversy between the parties. The only questions necessary to be considered, therefore, are whether the decedent was of sound and disposing mind and memory at the time of making the alleged will, and was fully aware of the nature and contents thereof, at the time it was executed; and if so, whether it was or was not obtained from him by fraud and imposition, or undue and improper influence. As the testimony in the case is the same which was before me upon the appeal from the surrogate, in relation to the validity of the instrument as a will of personal property, and as there is nothing in the pleadings materially to change the case. I have only considered it necessary to re-examine the evidence,

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to see if it would make any different impression upon my mind from what it made on that occasion. And upon a careful examination of the case, after a most able argument thereof by counsel, I cannot bring my mind to the conclusion that this will should be sustained, upon any principle of justice or fair dealing in reference to testamentary dispositions of property.

It is not necessary here to repeat the reasons which I formerly gave for considering the instrument in question invalid, as a testamentary disposition of property, not only from want of mental capacity on the part of John Fisher to dispose of his estate by will, but also because, even if sufficient mental capacity existed, there is no evidence that he knew the contents of the instrument to which he was induced to put his name. And there is conclusive evidence to show that if he had mental capacity, he was induced to make the will by a most gross and outrageous fraud practised upon him, in relation to the supposed child of his lunatic brother ; which brother had been persuaded, by the conspirators, to have a ceremony of marriage performed between him and the woman who afterwards padded herself up for the purpose of the imposition, and then stole the child from the almshouse to carry out the plan of the conspirators. I must accordingly declare the will void, so far as the rights of the parties to this suit, in the real estate of the testator, are concerned. The part of the decree, therefore, which declares it valid, and directs the bill to be dismissed with costs, as to these respondents, must be reversed. And a decree must be entered declaring the will void, so far as relates to the parties to this suit ; and also declaring that it was obtained by fraud and imposition. The respondents must likewise be ordered to deliver up the real estate in question, to the appellants ; and must account to the complainants for the rents and profits received by them respectively, subsequent to the filing of the bill in this cause, over and above the dower right of the defendant Diana Sawyer in the premises. It must be referred to one of the masters of this court, or in case the office of master shall become vacant before the execution of such reference, then to a referee to be appointed by the supreme court in

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equity, to take an account of such rents and profits; and the question of costs, and all other questions and directions are reserved until the coming in and confirmation of the report.

KIDD and others, executors, &c. vs. CHAPMAN & DANIELS

[Referred to, 11 Abb. N. C. 52.]

The mere neglect to pay a just debt, by an executor, when he is called on for payment, or even a refusal to pay, upon any other ground than that the debt claimed, or some part thereof, is not legally or equitably due, is not a disputing or rejection of the debt, within the meaning of the statute; so as to require the creditor to sue for its recovery within six months or be barred.

It is the duty of an executor, or administrator, when a claim is presented against the estate of the decedent, to inform the claimant, explicitly, whether he means to reject or dispute such claim, or any part thereof, upon the ground that it is not justly due. Or, if he wishes further time to investigate the justice or legality of the claim, he should apprise the claimant of such wish; and should be prepared to admit or reject the claim, or to refer it, within a reasonable time thereafter.

It is not only in the power of the legislature to establish a summary remedy for the settlement of the estates of deceased persons, but it has authorized the surrogate to examine and decide as to the validity of all claims against the personal estate of the decedent, upon an application for the final settlement of the accounts of an executor or administrator.

The provisions of the revised statutes authorizing the surrogate to decree the payment of a debt, where the executors or administrators do not think proper to ask for a final settlement of their accounts, are not imperative.

Accordingly, where the claim of the creditor is intended to be contested in good faith, and where the same has in fact been rejected or disputed by the executors, or administrators, at the time it was presented to them for payment, and the claimant has neglected to proceed at law to establish the validity of his claim, it seems the surrogate, in the exercise of a sound discretion, may refuse to permit the claim to be litigated before him, in the first instance upon a direct application of the claimant for the payment of his debt.

The surrogate has the power to decree the payment of a judgment recovered against the testator, in his lifetime, although the executor does not ask for a final settlement of his accounts.

Although a judgment recovered against a testator is conclusive evidence of his indebtedness at the time of such recovery, so long as the judgment remains unreversed, still it is only prima facie evidence of indebtedness as against his personal representative; as it may have been paid.

It is not a proper exercise of discretion, on the part of a surrogate, to refuse to pro-

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ceed further upon the petition of a judgment creditor, for the payment of his debt by the executors of the judgment debtor, where such creditor has sworn in his petition that the debt is still due, merely because the counsel for the executors says that his clients dispute the debt. But the answer to such petition should either deny the recovery of the judgment, or should state that it has been reversed, or paid either in whole or in part; and it should be verified by oath.

THIS was an appeal from a decree of the surrogate of the county of Rensselaer. In January, 1838, the respondents, Chapman and Daniels, recovered a judgment against A. Kidd, which was docketed on the 25th of the same month. Kidd died a few days afterwards, possessed of a large personal estate, and the appellants M. and J. Kidd, proved his will and took out letters testamentary thereon, as his executrix and executor. The judgment was for about \$156; and the inventory of the personal estate of the decedent exceeded \$20,000. Soon after, letters testamentary were granted to the appellants, and more than six months before the presenting of the petition of the respondents, to the surrogate, the attorney of Chapman and Daniels called upon J. Kidd, the executor, with the judgment, and requested payment thereof to his clients. The executor promised to call on his legal adviser the same afternoon, and to let the respondents' attorney know if it would be paid; but he never gave him, or his clients, any information on the subject. In November, 1839, more than eighteen months after granting letters testamentary to the appellants, a petition was presented to the surrogate stating these facts, and also that the judgment still remained due and unpaid, and praying that the executrix and executor might be called to render an account of their administration of the estate of the decedent, and might be decreed to pay the amount due upon the judgment.

Upon the return of the citation, the executrix and executor appeared, by their counsel, and disputed the debt and refused to pay the same; and they then insisted that the surrogate had no jurisdiction to compel them to pay such disputed debt until the same had been referred, or prosecuted to judgment against the executrix and executor. But they neither admitted nor denied the allegation, in the petition, that the personal

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estate of the testator was more than sufficient to pay all his debts. The respondents thereupon proved their debt, by the production of the record of the judgment; and they proved the amount of the testator's personal estate, by the production of the inventory filed by the executrix and executor. They also proved the presenting of the judgment to the executor, and a request of payment, and his promise to see his counsel and to communicate the result of the interview, as above stated. The counsel for the executrix and executor thereupon insisted that the facts proved amounted to a rejection of the claim; and that, as it had not been prosecuted within six months there after, the claim was barred by lapse of time. The surrogate, however, overruled the objections, and made a decree for the payment of the amount of the judgment, and interest thereon as damages, with the costs of the proceedings. From this decree the executrix and executor appealed to the chancellor.

S. G. Huntington, for the appellants. I. A surrogate has no jurisdiction, not expressly given by the statute. (2 R. S. 154, § 1.) He has no power or authority to order or decree payment, by the executor or administrator, of a judgment rendered in the supreme court, against an intestate or testator until such judgment has been revived against the executor or administrator by *scire facias*, or by a suit upon the judgment (23 Wend. 477.) The revised statutes do not give the surrogate any jurisdiction over, or power to enforce payment of judgment against decedents, by the executor or administrator. Neither do the revised statutes give to the surrogate power to enforce payment of judgments rendered against executors or administrators but they only give him authority in such cases to call the executors or administrators to account; and upon such accounting, to determine the amount to be paid, as it respects assets, and to direct an execution to issue for that amount out of the court in which judgment was rendered. (2 R. S. 29, § 32.)

A writ of *scire facias* to revive a judgment will lie, in favor of a creditor, against the executor or administrator of the debtor. (2 R. S. 477, § 2.) To this action, the executor or administra

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tor may plead several matters as a defence. (*Dunl. Prac.* 1115. 1 *Chit. Pl.* 482.)

An action of debt may be brought on the judgment against the executor or administrator, to which he may plead several matters by way of defence. (1 *Tidd's Prac.* 596. 1 *Chit. Pl.* 103, 104, 481.)

To an action of debt, or to a *scire facias* on judgment, the executor or administrator can plead *nul tiel* record, release, that the debt was levied by *fi. fa.*, *elegit*, or *ca. sa.*, or *plene administravit*. Does the statute giving jurisdiction to the surrogate, give him power to try and examine the validity of any defence which the executor or administrator might plead or set up? and does it deprive the executor or administrator of any and all defences, which he before might have set up or pleaded? Are we to lose the trial by jury?

All orders and decrees of surrogates are to be enforced by attachment. (2 *R. S.* 155, § 6.) How is this order or decree to be enforced?

II. A surrogate has no power or jurisdiction to make orders or decrees, respecting the payment of any judgment, in whole or in part, except the judgment is against the executor or administrator. (See 2 *R. S.* 53, §§ 20, 21, 22, 23. *Id.* 29, § 32. 23 *Wend.* 477.) And then only by ordering execution to issue out of the court in which judgment was rendered. No account has been rendered or settled by the administrators. No decree for payment of any debt can be made until this is done. (2 *R. S.* 29, § 32.) There was no evidence before the surrogate of assets, except the inventory. It does not appear there were sufficient to pay debts. No account was rendered and none was called for. On the inventory alone the adjudication was made of sufficiency of assets. The statute contemplates suits at law against the executors and administrators. (2 *R. S.* 2d ed. 30, § 38 to 41. *Id.* 53, § 20 to 22. *Id.* 51, § 9. *Id.* 364, 365, 511, § 18.) The eighteenth section of the revised statutes, (2 *R. S.* 52, 53; *Id.* 154, § 1,) does not apply to this case.

First, a judgment is not a debt within the meaning of this
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statute. (*See* § 20, *p.* 53.) Second, the payment of judgments is to be enforced by execution, out of the court in which judgment is rendered, and not by decree of the surrogate. (2 *R. S.* 53, § 20.) The surrogate has no power to decree payment of any debt or claim which is disputed, or has been rejected, by the executor or administrator, until it has been referred, or a suit at law has been commenced and a judgment obtained thereon against the executor or administrator.

I therefore contend that a surrogate has no power or authority to enforce the payment of a judgment against a deceased person. A judgment creditor must first obtain judgment against the executor or administrator, and then obtain an order from the surrogate calling upon the executor or administrator to account, and upon such accounting he will obtain from the surrogate an order or decree as to the amount due such creditor with reference to the amount of assets, and also a decree from the surrogate directing execution to be issued out of the court in which judgment was rendered, for the amount found due by him. This is the course to be pursued, by the judgment creditor, and is the only way in which the surrogate can interfere, where the executor refuses to pay the judgment.

The court in which the judgment is rendered is first to decide all questions in relation to the same, and as to what remains due and unpaid thereon, and then the surrogate is to adjudicate as to the amount for which the execution is to issue, with reference to the quantum of assets.

H. Z. Hayner, for the respondents. I. The statute declares that judgments against testators or intestates shall have a preference over other debts not in judgments, and shall be first paid, with the following exceptions. (2 *R. S.* 87, § 27, 1st ed. *Id.* 28, § 27, 2d ed.) Every executor and administrator shall proceed with diligence to pay the debts of the deceased, and shall pay the same in the following order: 1. Debts entitled to a preference under the laws of the United States. 2. Taxes assessed upon the estate of the deceased before his death.

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3. Judgments docketed and decrees enrolled against the deceased according to the priority thereof respectively. (2 R. S. 87, § 27.) By this statute it clearly appears that the respondents were entitled to be paid before all ordinary creditors of the deceased. And the executor, when called upon to pay the judgment, does not refuse to pay it, nor does he reject it, or raise any question as to the amount due, or as to the validity or honesty of the claim, but he says he will see his counsel and let the creditor know. At two different times he repeats substantially the same story, but never proceeds any farther. This, as the counsel for the appellants insists, was substantially a rejection of the demand or claim by them, and ousted the surrogate of jurisdiction, and compelled the respondents to proceed by suit within six months, under the provisions of the statute, (2 R. S. 87, § 38,) or be forever barred from maintaining an action.

In respect to this claim of the appellants' counsel I shall make but two remarks. 1. The debt under consideration being in a judgment, is not such a claim as is referred to in the statute. The statute relates to an uncertain unliquidated debt, and not to a debt in judgment, which carries verity on its face. 2. The disputing or rejecting, referred to in that statute, is also a very different thing from what appears in this case. There must have been a distinct and explicit refusal to pay, on the part of the appellants, on the ground that the amount claimed was not due, or that the claim was dishonest, or that they were not liable to pay it. The tenor of the statute clearly shows this. (2 R. S. 89, § 38. *Clark v. Sexton*, 23 Wend. 477, 479.)

The rejection of the claim, and refusal to pay it, must also have taken place after the publication of a notice, by the executors, to present claims against the deceased. This was not done in the case under consideration. No such notice was ever published by the appellants.

II. If the refusal to pay the judgment was not such a rejection as would compel the respondents to bring a suit in order to save their rights, or in case the claim was not such an one as is contemplated in that statute, the surrogate had juris-

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diction of the case. (2 R. S. 116, § 18. *Nichols v. Chapman*, 9 Wend. 452.) Section nineteen of the statute also shows how such a decree can be enforced. The surrogate may cause the bond of the executor or administrator to be prosecuted in the same manner as upon a final accounting. The respondents, at common law, would have had the right, perhaps, to issue execution on their judgment, tested the first Tuesday of February, 1838, before the death of Archibald Kidd, the defendant, and made returnable the first Tuesday of March, 1838, after his death. Executions can only be issued one month and made returnable the next, in the Troy mayor's court. This right or remedy could only have continued, therefore, for one month, and would have been an ungracious remedy; especially where the decedent left a large estate, as he did in this case.

But our statute has entirely taken away this right, by declaring that no execution shall issue on any such judgment after the death of the party against whom the same was rendered. (2 R. S. 291, § 27, 2d ed. 9 Wend. 452.)

If a man dies after judgment, a writ of execution may be sued out against his goods in the hands of his executor without a scire facias, provided such writ bears teste before his death. (*Grah. Prac.* 897. 2 *Bac. Abr. Ex'r*, G. 2.) If no execution was thus issued, it was necessary to revive by scire facias; or an action of debt on the judgment must be prosecuted. To prosecute the action of debt would probably be a waiver, by the judgment creditor, of his preference to which the respondents in this case were entitled. The scire facias must be prosecuted within one year after the cause of issuing the same shall arise. (2 R. S. 576, § 2.) That cause is the death of the defendant in the execution. (*Clark v. Saxton*, 23 Wend. 479.) But either of these remedies would only have produced a judgment against the appellants, which must necessarily have caused considerable expense to the respondents, and no costs could have been recovered against the executors. (2 R. S. 30, § 41.)

The spirit of the whole statute, granting to surrogates powers and jurisdiction in respect to the settlement of the estates of decedents, shows that the object of the legislature was to fur-

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nish facilities to attain this end with the least possible litigation or expense to the estate to be settled. Chief Justice Savage, in *Chapman v. Nichols*, (9 *Wend.* 456,) remarks: "I have not found any positive prohibition against a creditor prosecuting an executor or administrator, but the provisions of the revised statutes are tantamount to it. No costs can be recovered," &c. The revival by *scire facias* was not abolished, because it might in some cases be necessary to retain a lien on real estate and effect a sale thereof; but a question has been raised, whether even that process was not actually superseded. (12 *Wend.* 542.) But in this case there was no real estate. The only object then to be attained by a revival by *scire facias*, or the prosecution of an action of debt, would have been to obtain a judgment against the appellants so as to authorize the respondents to apply to the surrogate for an execution. This, however, is almost always nugatory and useless; as all the personal property of decedents is usually sold long before such application can be made. Thus, after all the expense of obtaining judgment against the appellants, by *scire facias*, or by debt on judgment, the respondents would have been driven to the same remedy adopted by them in this case, viz. an application to the surrogate for a decree for the payment of the judgment, and if it was not paid after decree made, the prosecution of the bond of the appellants, or proceeding by attachment as provided by the revised statutes.

THE CHANCELLOR. There is no foundation for the objection that the claim was barred, by the neglect of the respondents to bring a suit on their judgment within six months after it was presented to the executor for payment. The statute, (2 *R. S.* 89, § 38,) provides that if a claim against the estate of the decedent is exhibited to the executor or administrator, and the same is *disputed* or *rejected*, and shall not be referred, the claimant shall bring his suit within six months, for the recovery thereof, or shall be barred from ever recovering the same. But it would be a gross perversion of the meaning of the statute to hold that what took place when the judgment

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was presented to the executor for payment, was either a rejection or a disputing of the demand, within the fair intent and meaning of the statute on that subject. The mere neglect to pay an honest debt, by an executor, when he is called on for payment, or even a refusal to pay, upon any other ground than that the debt or some part of it is not legally or equitably due, is not a disputing or a rejection of the debt, so as to require the creditor to sue for its recovery within six months or be barred. For the executor may have many reasons for declining to pay a debt immediately, although he does not intend to question its existence and legality, or the propriety of its being paid out of the estate of the decedent. In the case of *Elliot v. Cronk's administrator*, (13 *Wend. Rep.* 35,) the administrator, upon the claim being presented to him, told the agent who presented it that he did not know whether the demand was correct or not; that he had not yet investigated the affairs of the estate, and that he would consult counsel and let the agent know his determination; but he did not afterwards make any communication on the subject. The court there held that the statute must be construed strictly, and that this was not a disputing of the demand, within the meaning of the statute; and that it would not have been, even if the administrator had not promised to let the agent know his final determination. A similar decision was made by the supreme court in the case of *Reynolds v. Collins*, (3 *Hill's Rep.* 36.) It is the duty of the executor or administrator, when a claim is presented against the estate of the decedent, to inform the claimant, explicitly, whether he means to reject or dispute such claim, or any part thereof, upon the ground that it is not justly due. Or if he wishes further time to investigate the justice or legality of the claim, he should apprise the claimant of such wish; and should be prepared to admit or reject the claim, or to refer it, within a reasonable time. Then the claimant will understand his rights; and if the claim is rejected, or is not admitted within a reasonable time, he will be authorized to bring a suit to establish such claim. He will then also be in a situation to ask for costs, if he succeeds in such suit. Here, as the judg-

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ment was recovered but a few days before the death of the testator, it is wholly improbable that the executor wished or intended to dispute the validity of the claim; but he might, very reasonably, have wished to consult the attorney in the suit, in relation to the recovery of the judgment, and to ascertain whether the matter was to be further contested. The only question, therefore, is whether the surrogate had jurisdiction to decree the payment of this debt; without subjecting the judgment creditors to the useless expense of bringing another suit, at law, against the executrix and executor, upon the judgment, and recovering a new judgment thereon against them.

The only objection that can reasonably be made to the exercise of such a power by the surrogate, is that it might, in some cases, deprive the personal representatives of the decedent of the right to have the debt claimed established by the verdict of a jury, before it is decreed to be paid. That, however, is a matter resting altogether in the discretion of the legislature; especially where the executor or administrator, upon the presentment of the claim to him, does not think proper to deny its justice or legal validity; so as to make it the duty of the claimant to bring a suit at law to establish his claim, at the expense of such executor or administrator, or of the estate of the testator or intestate. It is not only in the power of the legislature to establish a summary remedy for the settlement of the estates of deceased persons, but it has unquestionably authorized the surrogate to examine and decide as to the validity of all claims, against the personal estate of the decedent, upon an application for the final settlement of the accounts of an executor or administrator. The 71st section of the article of the revised statutes relative to the duties of executors and administrators, in rendering an account, and in making distribution to the next of kin, declares that upon the final settlement of the account, if it shall appear that any part of the estate remains to be paid or distributed, the surrogate may make a decree for the payment and distribution thereof among the *creditors*, legatees, widow, and next of kin, according to their respective rights; and in such decree *shall* settle and determine all ques-

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tions concerning any *debt*, claim, legacy, bequest, or distributive share; to whom the same shall be payable, and the sum to be paid to each person. (2 R. S. 95.) The only exception to this imperative direction, to the surrogate, to determine all questions as to debts or claims against the estate of the decedent, upon a final settlement of the accounts of the personal representatives, appears to be in the seventy-fourth section of the same article. That section provides, that if it appears to the surrogate that any claim exists against the estate, which is not then due, or upon which a suit is then pending, he shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained for the purpose of satisfying such claim when due, or when recovered; or of being distributed according to law. (2 R. S. 96.)

The provisions of the revised statutes, authorizing the surrogate to decree the payment of a debt, where the executors or administrators do not think proper to ask for a final settlement of their accounts, are not imperative; and therefore where the claim of the creditor is intended to be contested in good faith, and where the same has in fact been rejected or disputed by the executors or administrators, at the time it was presented to them for payment, and the claimant has neglected to proceed at law to establish the validity of his claim, the surrogate, in the exercise of a sound discretion, may perhaps refuse to permit the claim to be litigated before him in the first instance, upon a direct application of the claimant for the payment of his debt. But the 18th section of the title of the revised statutes relative to the rights and liabilities of executors and administrators, (2 R. S. 116,) expressly declares that the surrogate shall have power to decree the payment of *debts*, legacies, and distributive shares, upon the application of a creditor at any time after six months, and upon the application of a legatee or distributee at any time after one year, from the time of granting of the letters testamentary or of administration. And in the case under consideration, I think the surrogate had power to decree payment of the respondent's judgment; al-

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though the executor and executrix did not ask for a final settlement of their accounts.

It is true that although the judgment recovered against the testator, in his lifetime, was conclusive evidence of his indebtedness at the time of the recovery of such judgment, so long as it remained unreversed, it was only *prima facie* evidence of indebtedness against his personal representatives; as it might have been paid by the testator in his lifetime. And even if the judgment had been recovered against such representatives they might still dispute the existence of the debt, before the surrogate, by contending that it had been subsequently paid. But in neither case would it be a proper exercise of discretion on the part of the surrogate to refuse to proceed further upon the petition of the judgment creditor for the payment of such a debt, where the creditor in the petition had sworn that the debt was still due, merely because the counsel of the personal representatives of the decedent thought proper to say his clients disputed the debt. Even if it was proper to receive an oral answer by counsel, to a sworn petition which stated the recovering of the judgment, and that it was still due, and that the personal estate was more than sufficient to pay all the debts of the decedent, it was no answer to such a petition to say that the debt was disputed. But the answer should either have denied the recovery of the judgment, or should have stated that it had been reversed, or had been paid, either wholly or in part, by the testator in his lifetime, or by his personal representatives after his death; and if paid in part, stating the amount of such payment. And if the executrix and executor expected to satisfy the surrogate that it was a proper case for him to suspend the proceedings until the petitioner had established the debt against them, in an action at law, they should have verified their answer by oath, at least as to their belief.

Under the circumstances of this case, I have no doubt that it was the duty of the surrogate to proceed upon this petition, and to decree the payment of the judgment therein mentioned, with interest and costs, out of the estate of the testator in the hands of the appellants; without subjecting the petitioners to

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the delay and expense of an action at law upon the judgment. The production of the record of such judgment was prima facie evidence of the debt claimed. And the inventory of personal estate, amounting to more than \$20,000, was prima facie evidence that the funds in the hands of the personal representatives of the testator were sufficient to pay the amount proved to be due to the petitioners; in the absence of proof that any older judgments existed against the testator, at the time of his death, or that the fund in the hands of his executor and executrix was insufficient.

The decree appealed from must be affirmed with costs. And the appellants must pay to the respondents, interest upon the amount decreed, from the date of the surrogate's decree; as damages for the delay and vexation caused by this appeal. The decree is to be entered with the clerk of the county of Rensselaer; and may be enrolled and docketed in the supreme court, organized under the provisions of the new constitution, so that an execution upon the decree may issue out of that court; instead of having the proceedings remitted to the surrogate.

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The statute authorizing the surrogate to require an executor to give security, where his circumstances have become so precarious as not to afford adequate security for the due administration of the estate, is applicable to the case of an executor who has not sufficient property, exclusive of the contingent interest of his wife in the proceeds of the real estate of the testator, to pay his debts.

The statute does not fix the amount of the security to be given, by an executor who is irresponsible; except that it cannot be less than twice the value of the personal estate. But where the proceeds of real estate may come into the hands of an executor, by virtue of his trust, for the benefit of others, security in double the amount of such proceeds is not unreasonable, when the executor has become insolvent; unless the amount which is to come to his hands is very large. In that case, security to a limited amount beyond the fund to be administered, should be deemed sufficient.

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The statute authorizing executors to bring the proceeds of real estate into the surrogate's office, for distribution, is only for the benefit or protection of the executor; and it does not require the executor to place such proceeds in the surrogate's hands, where the real estate is sold under a power contained in the will.

Form of the bond to be given by an executor where he is required by the surrogate to give security. The bond given by an executor, under an order of a surrogate, is for the benefit of every person interested in the estate of the testator; and not merely for the benefit of the distributee, upon whose application the surrogate directs security to be given.

The costs of the application to the surrogate for an order upon an executor to give security, are properly chargeable upon the fund which is to come to the hands of the executor, and not upon the petitioner personally. Nor should such costs be charged upon the executor personally.

THIS was an appeal from an order of the surrogate of the county of Dutchess, requiring S. D. Holmes, the appellant, to give security for the faithful discharge of his trust, as executor of Noah Cock deceased. The application was made by W. H. Cock, the respondent, who was one of the residuary legatees of the testator. Three executors were appointed by the will but two of them died subsequent to the death of the testator; leaving the appellant, who was one of his sons in law, the sole executor. The personal estate had all been administered. And the only duty still to be performed by the executor, was to sell the real estate, after the death of the widow, and distribute the proceeds among the residuary devisees; one of whom was the wife of the appellant, who had filed a bill against him, for a separation.

A. Taber, for the appellant.

W. Wilkinson, for the respondent.

THE CHANCELLOR. The first objection made to the decree of the surrogate is that the appellant should not have been required to give security. Under the circumstances, I think there was no error in this respect. The statute authorizes the surrogate to require security to be given, where the circumstances of the executor have become so precarious as not to afford adequate security for the due administration of the estate.

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Here the contingency contemplated by the legislature had happened. Two of the three executors appointed by the testator, to discharge the trusts of his will, had died, and the surviving executor had become insolvent. His property consisted of a farm of the value of about \$6000, according to the testimony, and of stock and other personal property of the value of \$1000. And his debts, according to his own affidavit, were about \$7,600; including the interest due on the mortgage, and excluding the costs in the suit brought against him, by his wife, for a separation. His counsel supposes that he was also entitled to some \$2000 more, on account of his wife's interest in the proceeds of the real estate of the testator. But by advertising to the provisions of the will, it appears that the interest of the wife in those proceeds, is given over to her children, in case of her death before she comes into possession of them; or to the surviving distributees, in case of her death without issue. Again; there is a suit pending in which the wife, if she succeeds, will be entitled to this contingent interest, to the exclusion of her husband, even if it should eventually fall to her.

The objection that the amount of the security required is too large, is based upon the supposition that the appellant is the owner of this share of the proceeds of the estate to which his wife is presumptively entitled; and that it ought not to be taken into the estimate, in fixing the amount of the security. But as that share may in the end belong to others, it is reasonable to require security that this part of the proceeds of the estate shall be faithfully administered. Although the executor cannot dispose of the real estate until after the death of the widow, she is far advanced in life and may be taken away at any moment. He may then sell the farm without notice to any one; and being insolvent, there is no certainty that the proceeds will be safe in his hands. The statute has not fixed the amount of the security to be given in such cases, except that it cannot be less than twice the value of the personal estate. (2 R. S. 72, § 20. *Id.* 77, § 42.) But security in double the amount of the proceeds of the real estate which may come into the hands of the executor, for the benefit of others, by virtue of

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his trust, is not unreasonable, where the executor has become insolvent; unless the amount is very large. In that case, security to a limited amount beyond the fund to be administered, should be deemed sufficient.

The statute authorizing the executor to bring the proceeds of real estate, sold by virtue of a power contained in the will, into the surrogate's office for distribution, is only for the benefit or protection of the executor; and it does not require the executor to place such proceeds in the surrogate's hands. It therefore does not afford any additional security to the distributees, unless the fund is actually brought there for distribution.

The objection is not well taken, that the security should have been directed to be given to the distributee who petitioned, and only for the amount of his share of the fund. The statute directs that the bond shall be like those required by law from administrators. The bond, therefore, must be taken in the name of the people; and conditioned that the executor shall faithfully execute the trust reposed in him as such, and that he will obey all orders of the surrogate touching the administration of the estate committed to him. It is a bond for the benefit of every person interested in the estate. And if taken only in a sum sufficient to cover the interest of the petitioner, upon whose application the order for security was obtained, it would not afford him adequate protection. For the whole amount recovered against the sureties would have to be distributed among all those who had suffered by the executor's maladministration of the funds.

For the same reason the costs were properly charged upon the fund which was to be raised by the proceeds of the sale, and not upon the petitioner personally; as it was a proceeding for the benefit of the residuary legatees generally, in proportion to their interest in the fund which was to be protected by the security to be obtained by such proceeding. And as the insolvency of the executor may have arisen from misfortune, and not from his fault, there was no reason for charging the costs of the proceeding before the surrogate upon him personally. But as the decision of the surrogate was right, and therefore

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ought not to have been appealed from, the executor cannot be excused from the payment of the respondent's costs in this court, upon the appeal.

The order appealed from must therefore be affirmed, with costs, and the proceedings are remitted to the surrogate.

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[Reviewed, 4 Redf. 40, 43, 44, 45. Followed, 5 Redf. 460, 461.]

The petition of appeal, upon an appeal from a surrogate's decree, should name all the persons intended to be made respondents, and should pray that they may answer such petition.

After parties have voluntarily appeared and answered a petition of appeal, they cannot object that the petition is informal as to them.

Persons against whom no proceedings have been had in the appellate court, upon an appeal from a surrogate, and who have neither appeared nor answered the petition of appeal, are not to be considered as parties to the appeal.

A party seeking to open a settled account, in a proceeding before a surrogate for an account, should be able to show such a case as would have enabled him to file a bill in equity to surcharge and falsify such account.

At common law it was not necessary that a submission to arbitrators should be in writing; except where the controversy related to land, or to some matter in respect to which it was incompetent for parties to make a valid and binding agreement by parol. And where a submission is verbal, without any provision therein that the award shall be in writing, a verbal award is valid, at common law.

Where a matter is submitted to arbitrators, it is not necessary that there should be any express agreement to abide by the award when made. The law implies such an agreement, from the very fact of the submission.

The allowance of commissions, to executors, should be computed upon the aggregate sums received and paid out by all the executors collectively, and not upon the amount received and disbursed by each individual; so that five per cent only shall be charged upon the first \$1000 of the whole estate, and two and a half per cent upon the next \$5000, &c. And the whole commissions should be apportioned among all the executors, equally; or upon some equitable principle, in reference to their respective services in the administration of the estate.

Where a trust, held by an executor, is inseparable from the executorship, he is not entitled to double commissions, first in his character of executor, and again in his character of trustee.

THIS case came before the chancellor upon an appeal, by Elijah Valentine, one of the executors, from the sentence and

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decree of the late surrogate of the county of Westchester, upon the final settlement of the accounts of the executors of John Valentine, deceased. The will of the testator was not set forth in the surrogate's return ; which return showed a very irregular and imperfect state of proceedings before the former surrogate who made the decree appealed from. But from the petition, upon which the appellant was originally cited to render his account, and from other proceedings in the case, it appeared that the testator died in November, 1820, leaving personal estate, which was inventoried at about \$16,000, and a large real estate which his executors were authorized to sell. By his will, after disposing of a part of his estate in general legacies, &c., the testator directed the residue to be divided between three of his sons, Elijah, the appellant, and Frederick and William, two of the respondents. William was then a lunatic, and has continued to be such ever since. And in reference to his share of the estate, the testator directed the executors to invest it at interest upon good security, and to apply the income thereof to the support of William for life, and after his decease, to pay the principal to his children in equal shares. The will also contained a provision that if William should be restored to his reason, so as to be capable of managing his affairs, then the whole of that third of the residuary estate should be paid over to him, by the executors, to be disposed of by him as he should think fit. But he had been twenty years a lunatic at the time of the institution of the proceedings before the surrogate, and there was no probability that he would ever be restored to his reason, so as to entitle him to any part of the capital of the estate under the provisions of the will. And the appellant, who had received most of the funds of the estate, having neglected to invest them, or to render an account thereof to James Valentine, one of the children of William, who had an interest in the estate under the will, an application was made to the surrogate, by James Valentine, for an account. Upon the return of the citation the appellant applied to the surrogate for a final settlement of the accounts of the executors. It did not appear by the return whether the children of William were cited to attend the

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settlement of the accounts, or whether any guardian ad litem of their lunatic father was appointed. But counsel appeared for the lunatic; and his son James also attended upon the taking of the accounts before the surrogate. Stephen Valentine and Schuyler Valentine, the other two executors to whom the letters testamentary had been issued, and who had joined in the conveyance of the real estate under the will, were cited and rendered their accounts. The only account of one of them, however, was a charge of \$28,08, for his services and expenses as one of the executors; no part of the proceeds of the estate having actually come to his hands. Frederick Valentine, one of the residuary legatees, also attended before the surrogate, and claimed one third of the residuary estate in the hands of the appellant, as well as one third of that which was in the hands of Stephen Valentine, one of the co-executors; after deducting the moneys which he had actually received from the appellant on account of his share. This claim against the appellant was resisted, upon the ground that it had been submitted to arbitration, by parol, and that a parol award was made, by the arbitrators, settling the balance which was due to the claimant from the appellant as one of the executors. The appellant also proved the parol submission and the award, and that the residuary legatee had received the amount awarded to be due to him; and that he had given to the appellant a receipt for the same, specifying that it was in full for the balance due him, from the complainant, as executor, for all moneys due and coming to him from the proceeds of the real and personal estate of the testator. The surrogate, however, overruled that defence, to the claim of this residuary legatee, and only allowed the appellant the sum which he proved that he had paid to Frederick, on account of his share of the residuary estate. The account of the appellant with the estate was then referred to an auditor; who stated the same, with interest at six per cent on the moneys received and paid out, down to the 6th of October, 1832. And the appellant was credited with several sums paid out after that time, and before the making of the auditor's report, in March, 1839. This included \$100 paid to the appel

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lant's counsel upon the taking of the account, and \$150 paid to the arbitrators for their fees upon the arbitration, between the appellant and Frederick Valentine, in relation to the balance due from the former to the latter, on account of his legacy; both of which sums, with interest on the \$150 from the time it was paid, in 1834, were allowed by the surrogate as proper charges against the estate of the testator which belonged to the residuary legatees. The surrogate computed the interest at seven per cent, upon the balance due in 1832, and upon the expenditures of the appellant subsequent to that time. He also allowed to each of the executors who had received any portions of the estate, full commissions upon the amounts received and paid out by them respectively; but allowed no commissions to the other executors who had accepted the trust, and who had joined in the sale and conveyance of the real estate. The surrogate decreed that the balance in the hands of S. Valentine should be paid, one third thereof to F. Valentine, one third to the appellant, and the other third to W. Valentine, the lunatic legatee, or to whoever might be authorized to receive the same under the will of the testator. He also declared and decreed that the costs of the proctors and counsel of James Valentine and Frederick Valentine, the fees of the surrogate, and the claim of Schuyler Valentine for services, were proper charges upon the estate of the decedent; and that the appellant should pay them out of the balance found due from him. He farther declared and decreed that the appellant was entitled to retain one third of the balance in his hands belonging to the estate, as his distributive share as one of the residuary legatees, and directed him to pay one other third of such balance to F. Valentine, after deducting the payments already made, with interest thereon from the times they were paid. As to the other third, after deducting what had been paid for the support of the lunatic legatee, and the interest thereon, the decree directed the appellant to pay it to William Valentine, or whoever might be authorized to receive the same under the will of the testator; which third of the estate, after deducting therefrom one third of the commissions allowed to the appellant, amounted, on the

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18th of March, 1840, the date of the decree, to about \$8,000. But the decree did not ascertain or determine what part of this sum was the capital of the estate, in which the children of the testator's son William had a contingent interest, in case their father should die without having been restored to his reason, and what part was the interest which had accrued upon that capital, over and above the expenses and support of the lunatic.

The appellant appealed from the whole decree, and especially from certain parts thereof particularly specified in his petition of appeal. But he did not make Stephen Valentine, who was one of his co-executors, or any of the children of William Valentine, parties to the appeal. Frederick Valentine and Schuyler Valentine appeared and put in their answer, to the petition of appeal, by the same solicitor; and the lunatic respondent answered by his guardian ad litem.

W. Silliman, for the appellant.

J. Rhoades, for F. & S. Valentine.

J. W. Tompkins, guardian ad litem for the lunatic, *W. Valentine*.

THE CHANCELLOR. The petition of appeal was informal in not designating who were intended to be made respondents; by praying that they might answer the petition. (*Kellett v. Rathbone*, 4 *Paige's Rep.* 102. *Gardner v. Gardner*, 5 *Id.* 170.) The parties, however, who are interested in the matters appealed from, and who have voluntarily appeared and answered the petition of appeal, cannot now object that the petition of appeal is informal as to them. But those against whom no proceedings have been had in this court, and who have not appeared or answered, cannot in any proper sense be considered as parties. And the decree of the surrogate can neither be affirmed nor reversed so far as their rights are concerned; but the appeal must simply be dismissed, so far as it seeks a reversal or modification of the decree, in any respect, which will affect their interests. The part of the decree, how-

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ever, which relates to the distributive share of the respondent Frederick Valentine, as one of the residuary legatees, and so much of the decree for costs, in his favor, as charges any part of his costs upon the shares of the estate which the appellant would have been entitled to retain, for his own benefit, if the claim of Frederick to a distributive share of the fund in the hands of the appellant had been disallowed, can be reversed or modified without impairing the rights of any person who has not been made a party to this appeal. That part of the decree, therefore, must be reversed, in case it is found to be erroneous, and if it is a proper subject of consideration here. And, for the same reason, that part of the decree which directs the appellant to pay to Schuyler Valentine the sum allowed to him for his services, as one of the executors, and which directs the appellant to pay the costs of his proctor and counsel out of the estate, may be reversed upon this appeal, if found to be erroneous; although neither the children of William, nor Stephen Valentine, who is one of the co-trustees of the part of the fund which belongs to William and his children, are before the court upon this appeal. The objections of the appellant to these portions of the decree, I shall therefore proceed to consider.

The charges of Schuyler Valentine, for expenses in attending upon the probate of the will, and upon the settlement, are not verified in the manner required by law to make them evidence in his own favor; in the absence of written vouchers for the payments. The statute requires that the executor shall swear positively to the fact of payment; specifying when, and to whom, the payment was made. (2 R. S. 92, § 55.) It does not appear, however, that any objection to this account, or to the form of the oath to the same, was made by the appellant before the surrogate. And it is wholly improbable that such an objection was made by the appellant, who was himself allowed several items of expenses of a similar character, upon a general affidavit annexed to his account; and without specifying at what time, or to whom, such payments were made. It would, therefore, be unreasonable to allow an objection of this kind to be taken on appeal, when it might perhaps have

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been obviated at once, by a new affidavit, had the objection to the form of the attestation been made before the surrogate. And as this respondent was subjected to the costs and expenses of accounting before the surrogate, without any fault on his part, the surrogate very properly directed the costs of his proctor and counsel to be paid out of the estate of the decedent. So much of the decree as directed the payment of the \$28,08 to him, and the payment of his costs, must therefore be affirmed. And the appellant must also pay to him, or to his solicitor interest on the amount directed by the surrogate to be paid to him and his proctor, from the date of the decree appealed from, as damages for the delay and vexation caused by this part of the appeal.

In relation to the claim of the respondent Frederick Valentine, I think the surrogate erred in holding that the appellant was bound to account to him, or that he was entitled to claim any part of the estate in the hands of the appellant. Even if a parol submission and award was not binding upon the parties, the statement of the account between them, by Ferris and McDonald, at their request, and the subsequent giving of the receipt in full, by the legatee, upon the basis of that statement, should be considered as conclusive between the parties; unless one of them could show that a mistake had been committed of which he was ignorant at the time. In other words, the party seeking to open such a settled account, should be able to show such a case as would have enabled him to file a bill in equity to surcharge and falsify the account. And the evidence before me does not make out such a case. Indeed the testimony shows that certain items paid to Frederick himself, and which were disallowed in the appellant's account against the estate, either because they were barred by lapse of time or otherwise, would, as between the appellant and Frederick, have been proper charges against the latter's third of the estate given to the residuary legatees. I also think there was a valid and binding submission and award, between these parties, which the surrogate was not authorized to disregard; even if it was evident, from the testimony before him, that Ferris and McDonald

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had erred as to the amount which was due from the appellant to this respondent, at the time of their award in 1834.

By the principles of the common law, it was not necessary that a submission to arbitrators should be in writing; except where the controversy was in relation to land, or to some matter as to which it was incompetent for parties to make a valid and binding agreement by parol. (*Billings' Law of Awards*, 9. *Kyd on Awards*, 7. *Walters v. Morgan*, 2 *Cox's Ch. Cas.* 369.) And where a submission is verbal, and without any provision therein that the award shall be in writing, a verbal award is valid. (*Cable v. Rogers*, 3 *Buls. Rep.* 311.) In the case of *Wells v. Lain*, which came before the court of errors in 1835, (15 *Wend. Rep.* 99,) I was strongly inclined to the opinion that the provisions of the revised statutes required all submissions to arbitrators to be in writing. But the court of dernier resort having decided otherwise, in that case, I do not feel myself authorized to adhere to my own opinion in opposition to that decision. In the present case, there can be no doubt, from the testimony of Ferris and McDonald, that the parties intended to submit to them the question as to what sum was due from the appellant, to F. Valentine as one of the residuary legatees. And where a matter is submitted to arbitrators, it is not necessary that there should be any express agreement to abide by the award when made. For the law implies such an agreement from the very fact of submission. So much of the decree appealed from, therefore, as declares that there is a balance due to the respondent, Frederick Valentine, of the funds in the hands of the appellant, and so much thereof as directs the appellant to pay such supposed balance, and so much of the decree as allows costs to the said respondent, on the proceedings before the surrogate, and directs the payment thereof by the appellant, must be reversed. And Schuyler Valentine and Frederick Valentine having both appeared by the same solicitor, and joined in their answer to the petition of appeal, and the appellant having failed in his appeal as to one of them, and succeeded as to the other, neither of those parties is to have costs as against the other upon the appeal.

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As between the appellant, and the respondent, W. Valentine, and the children of the latter, who are not made parties to this appeal, I do not see that any error has been committed, to the injury of the appellant. The error in the mode of computing the interest, if there was an error, was the other way. For as the appellant had neglected to invest the fund belonging to the lunatic and his children, as directed by the will of the testator, and had mixed it with his private funds in the bank and used it as his own, the surrogate might properly have charged him with what would have been made by investing the money, and re-investing the income thereof, from time to time, beyond what was required for the support of the lunatic. And in the allowance of commissions, the surrogate clearly erred in favor of the appellant, by allowing him more than he was legally entitled to. The allowance of commissions should be computed upon the aggregate sums received and paid out by all the executors collectively, and not upon the amount received and disbursed by each individually; so that five per cent only shall be charged upon the first \$1000 of the whole estate, and two and a half per cent upon the next \$5000, &c. And the whole commissions should be apportioned among all the executors, either equally or upon some equitable principle, in reference to their respective services in the administration of the estate. But in this case, the surrogate has allowed to each of the executors who received and disbursed moneys for the estate, five per cent upon the first \$1000, and at the rate of two and a half per cent upon the next \$5000, received and disbursed by each; thereby charging the estate with five per cent upon the first \$2000 received and disbursed, instead of upon the first \$1000 only.

The funds in the hands of the executors for the benefit of the lunatic and his children were held by them in their characters of executors; and the trust and the executorship were inseparable. The appellant, therefore, was not entitled to double commissions, first in his character of executor and again in his character of trustee. The case would have been different, if the executors had been directed by the will to pay over this part of the fund to one of their number, as a trustee,

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upon a separate and distinct trust. All that was proper to be done under the will of the testator, in the present case, was to invest the capital of the share of William upon permanent securities, in the names of all the executors jointly, as such ; so as to preserve the capital of this portion of the estate for the use of those who might eventually be entitled to the same under the provisions of the will. The income arising from such investment, beyond what was necessary for the support of the lunatic, should have been reinvested, for his use and benefit, from time to time as it was received. And the decree in this case should have directed that the funds in the hands of both of the executors, belonging to this share of the estate, be reinvested in that manner until the happening of the contingency upon which it was to be paid over to the lunatic, or to his children, absolutely. If the proper parties were before the court therefore, it might be proper to modify the decree accordingly. But even as the decree stands, there is nothing which prohibits the appellant, either from making such investments, or applying the income to the support of the lunatic until the time arrives for paying over the capital of the fund, to him, or to his children, as directed by the will.

The costs of James Valentine were rightfully allowed against the estate, as it was proper for him to call for an account, not only for the purpose of seeing that the fund in which he had an interest was regularly invested, but also to ascertain the amount of that fund. The fact that it was to be held in trust by the executors until the death or restoration of the lunatic to sanity, did not form any objection to the settlement of the account for the purpose of determining what the amount of the trust fund was ; although the executors could not be decreed to pay over the money, until the time arrived for its payment, either to the lunatic or to his children, in conformity to the directions of the will. But as James Valentine is not a party to the appeal, this part of the decree can neither be affirmed nor reversed. Nor can the court, upon the appeal between the present parties only, alter or modify the decree in relation to the surrogate's fees. Some part of those fees must have arisen

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from services performed by him for parties who are not before me upon this appeal. And if this part of the decree should be reversed, it might leave those parties liable to the surrogate for such fees, and without any remedy over for the same against the appellant, although he has actually been allowed for those fees, in his account against the estate.

Several other questions are raised by the appellant's counsel which cannot properly be disposed of, on account of the absence of the necessary parties. All that is proper to be done, therefore, is to dismiss the appeal as to every part of the decree, except as to the parts thereof which I have before disposed of between the appellant and the respondents Frederick and Schuyler Valentine. The proceedings must also be remitted to the surrogate of the county of Westchester; to the end that such parts of the decree appealed from as are not reversed, may be carried into effect in that court.

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[Followed, 43 Superior, 335. See 21 How. 360; 24 Id. 379.]

Even in cases where the defendant, in a suit to foreclose a mortgage, has not delayed the proceedings and increased the costs, by an improper defence, the necessary expenses of the suit, as well as of the master's sale, are to be deducted out of the proceeds of the mortgaged premises; thereby rendering the mortgagor, in effect, liable for those costs and expenses, if the proceeds of the sale are not sufficient to pay the whole debt for which he is personally liable. And where the mortgagor sets up an unfounded defence, and thus delays the proceedings, it is proper to charge him personally with the costs; instead of taking them out of the proceeds of the mortgaged premises, which in equity belong to the complainant or to other persons holding incumbrances upon the premises.

Where two mortgages, upon the premises, are recorded at the same time, and each mortgagee is cognizant of the giving of the other mortgage, at the time that he takes his own, the recording acts have no application to the case, in respect to the question of priority.

Although two mortgages upon the same premises, given to different persons, bear the same date, and are acknowledged at the same time, if it appears that it was the agreement and intention of all parties that one of the mortgages should have

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a preference over the other, so as to be a prior lien upon the premises, the law, for the purpose of carrying into effect that intention, presumes that the mortgage which was intended to be preferred, was delivered first.

THIS was an appeal by Lyman Phelps, one of the defendants, from a part of the decree of the vice chancellor of the seventh circuit, in this cause. In July, 1841, Phelps, the appellant, gave a mortgage to Jones, the complainant, for \$1000, and interest. In April, 1842, Phelps conveyed the mortgaged premises to J. K. Crandall, subject to this mortgage; and Crandall agreed to pay the mortgage, as a part of the consideration of the conveyance to him. On the same day Crandall executed two mortgages upon the premises; one to A. Hill, for \$1000, payable in two and three years, with annual interest, and another to Phelps, for \$651, payable in four years, with interest. Both of these mortgages were given in part payment of the purchase money of the premises, and were received and entered in the record by the county clerk as having been recorded at the same time. But the mortgage to Hill was received in part payment of a debt due to him from Phelps; who, at or previous to the delivery of the mortgages, agreed with Hill that the mortgage to the latter should have priority over the other, so as to have a preference in payment as a prior lien upon the mortgaged premises. Hill subsequently assigned his mortgage to Jones, the mortgagee in the original mortgage given by Phelps. In 1845, the complainant filed his bill in this cause, to foreclose his original mortgage as well as the one assigned to him by Hill. He also stated in his bill the agreement between Hill and Phelps, relative to the priority of the last mentioned mortgage over the mortgage to Phelps of the same date. And Crandall and Phelps, the mortgagors in the two mortgages of the complainant, and several other persons, were made defendants. The bill was taken as confessed as to all the defendants except Phelps. He put in an answer, without oath, denying the agreement stated in the bill relative to the priority of the Hill mortgage. A replication to that answer was filed, and the cause was heard before the vice chancellor

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upon pleadings and proofs. The vice chancellor decided that the mortgage assigned to the complainant, by Hill, was entitled to a priority in payment over that of the same date given to Phelps. And he directed a reference to a master to compute the amount due to the complainant upon his two mortgages. Upon the coming in of the master's report, the vice chancellor made a final decree of foreclosure, and for the sale of the premises to satisfy the amount reported due upon those two mortgages, with the costs of suit. The decree further directed that in case the premises should not sell for enough to pay the amount reported due, Crandall, who was primarily liable for the payment of both mortgages, should pay the amount of the deficiency; and if satisfaction thereof could not be had by execution against him, then such deficiency, or so much thereof as could not be collected of Crandall, should be paid by Phelps the appellant, who was personally liable for \$1000, and interest thereon from the second day of July, 1841.

The defendant Phelps appealed from so much of the decree as made him contingently liable to the complainant for any part of the sum reported due by the master, or the interest thereon, or of any part of the costs of the suit in case the mortgaged premises should sell for enough to pay the first mortgage with the interest due thereon.

L. Birdseye, for the appellant. 1. The deed by Phelps, dated April 1, 1842, conveying the mortgaged premises to Crandall, one of the defendants, subject to the payment by Crandall of the mortgage of July 2, 1841, from Phelps to Jones, rendered the mortgaged premises the primary fund for the payment of that mortgage; and Phelps cannot be held personally liable, in equity, to pay any part of that debt and the costs, until after that fund has been exhausted. (*See 7 Paige*, 591; *Id.* 248, 465. *See also Tice v. Annin*, 2 *John. Ch. Rep.* 128; *Ferris v. Crawford*, 2 *Denio*, 595.) It appears by the pleadings and proofs that Jones took the assignment of his second mortgage, with a knowledge of such conveyance, and of the terms of it. He sets up no pretence of having purchased that

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mortgage without notice of that deed, and of the terms of it. (See *Harris v. Elz*, 7 *Paige*, 421.) Hill, the mortgagee, was present when the deed was executed, and is chargeable with notice of its terms; and the complainant deriving his title to the mortgage from Hill, is chargeable with all the equities to which the instrument was subject in Hill's hands. The complainant was also present at the giving of that mortgage.

2. The decree of the vice chancellor is inequitable and unjust, in requiring the appellant to pay off the bond and mortgage of Crandall, as it in effect does, in case it is not collected of Crandall.

3. No issue had been taken, or raised by the pleadings, as to the personal liability of Phelps to pay off the bond and mortgage of Crandall; and no decree can be founded upon evidence in relation to matters which were not in issue between the parties. (2 *Paige*, 61. 9 *Peters' Rep.* 483. 10 *Id.* 177.)

4. There was no evidence given of any agreement or promise made by Phelps to pay the bond and mortgage of Crandall, or any part of it.

5. If the bill can be construed to claim a joint judgment against different persons, for the aggregate amount of their several contracts, it was radically wrong, and the decree founded on it, and ratifying such claim, should be reversed on appeal. (2 *Mad. Ch.* 235. *Mitf. Pl.* 181.) If that be not the fair construction of the bill, then the decree is erroneous, and should be reversed, for adjudging a joint judgment against two defendants, for the aggregate amount of their several contracts, when no such claim had been made by the bill, and when all the facts established by the pleadings and proofs had demonstrated that the appellant was not personally liable to pay off the debt of Crandall, either jointly with him, or in succession after his failure.

W. H. Shankland, for the respondent. I. The decree does not charge the appellant with the payment of any deficiency, unless the property mortgaged fails to sell for sufficient to pay the mortgage for \$1000 executed by the appellant Phelps.

II. But if the decree will bear a different construction, then the respondent contends that it is right, for the following reasons:

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1 Because the defendant Phelps put in a false answer to the bill, and unnecessarily enhanced the costs to the amount of \$243,29 ; creating a deficit to that amount, which ought to have gone towards the extinguishment of the debt. And the effect of the decree is to charge him personally with the payment of those costs. 2. Because, when Phelps bought Hill's farm, he agreed to transfer to Hill, in part payment thereof, a bond and mortgage on the farm which he (Phelps) sold to Crandall. It is the fair and equitable import of that contract, that there should exist no prior liens on the farm sold to Crandall, to exhaust the value of it, so as to render the mortgage agreed to be assigned to Hill uncollectable ; and yet it turns out that Phelps had previous to that time executed a thousand dollar mortgage on the same premises to Jones, by means of which the Hill mortgage is in danger of being rendered worthless, because of the large amount due on the first mortgage to Jones. It was just, therefore, that the decree should provide against such a contingency ; as both of the complainant's mortgages were given for Phelps' own proper debt, and the Hill mortgage is in danger of not being satisfied out of the avails of the sale, in consequence of Phelps' default, in not paying his own first mortgage to Jones. III. If the decree is modified, it should make provision for Phelps' paying the costs in the court below, and the costs on the appeal. IV. Jones, as the assignee of Hill, is entitled to all his equitable rights and remedies, to enforce the payment of the bond and mortgage in question.

THE CHANCELLOR. The complainant made a mistake in drawing up the decree. For, upon a fair construction of its language, the appellant is made contingently liable for the amount of the bond and mortgage given by Crandall, as well as for the whole costs of the suit. He is clearly not liable for any part of the amount due upon that bond and mortgage. And if this part of the decree had been objected to in the court below, there is no question that it would have been properly settled before it was entered ; and thus have saved the delay and expense of an appeal. Although this part of the decree

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must be modified, therefore, it ought not to excuse the appellant from the payment of costs. For his solicitor should have proposed amendments, and have had the decree corrected in this respect, before it was entered. Or, if it was entered without serving a draft thereof upon him, he should have moved the vice chancellor to have it amended. Again, the appeal is too broad; as it proceeds upon the supposition that the appellant is not personally liable to the complainant for any deficiency, if the mortgaged premises should sell for enough to pay the first mortgage and interest; although the proceeds of the sale should not be enough to pay the costs of the suit also. Even in those cases where the defendant has not delayed the proceedings, and increased the costs, by an improper defence, the necessary expenses of the suit as well as of the master's sale are deducted out of the proceeds of the mortgaged premises; thereby rendering the mortgagor, in effect, liable for those costs and expenses, if the proceeds of the sale are not sufficient to pay the whole debt for which he is personally liable, in addition thereto. In this case, however, it would be wholly inequitable to take those costs which were made by the appellant's improper defence, out of the proceeds of the sale, if the proceeds are not sufficient to pay both mortgages. Besides, the defence put in by the appellant delayed the sale of the premises for a long time; as a decree might have been obtained in the spring of 1845, if he had not put in an answer, no part of which was sustained by the proofs in the cause. In the meantime the interest has been running on both mortgages; which would have been stopped, by the application of the proceeds of the mortgaged premises to the payment of the complainant's demand, if a sale had not been delayed by the defendant's litigation. In such a case, as the costs are in the discretion of the court, it is proper to charge them personally on the defendant who has caused them to be made; instead of taking them out of the proceeds of the mortgaged premises, which in equity belong to the complainant, or to others who hold incurable charges upon the premises.

In the present case, although the question as to the priority

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of the Hill mortgage over that given to the defendant, was disposed of by the interlocutory decree, which has not been appealed from, I have looked into the pleadings and proofs, in reference to this question of costs. And I find that the appellant was clearly in the wrong in respect to the question of priority. Both mortgages being recorded at the same time, and each mortgagee being cognizant of the giving of the other mortgage when he took his own, the recording acts had no application to the case. And the evidence clearly establishes the fact that it was the understanding, agreement, and intention of the parties, that the mortgage to Hill should have a preference over that which was given to Phelps, so as to be a prior lien upon the premises. Although they have the same date and were acknowledged at the same time, the law, for the purpose of carrying into effect the intention of the parties, will presume the mortgage to Hill to have been delivered before the delivery of the other mortgage of the same date to Phelps. The appellant's defence, therefore, was not only invalid but wholly unconscientious.

The decree must be modified so as to direct the master to ascertain the amount of costs to which the complainant would have been entitled, upon an ordinary decree, on a bill taken as confessed against all of the defendants; and to pay that amount, and also the costs and expenses of the sale, out of the proceeds of the mortgaged premises in the first place. The amount due on the second of January, 1846, the date of the master's report, upon the bond and mortgage given by the appellant, must be computed and stated in the decree; and the master who makes the sale must be directed next to pay that amount, with interest from the second of January, 1846, out of the proceeds of such sale. And if there is more than sufficient for those purposes, he must apply the residue of such proceeds, or so much thereof as may be necessary for that purpose, to pay the amount due on the complainant's second mortgage, with interest thereon from the last mentioned day; and he must bring the surplus, if any, into court for the benefit of whoever may be entitled to it, and subject to the further order

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of the court. If there is not sufficient, after paying the costs and expenses aforesaid, to pay the amount due upon the complainant's first bond and mortgage, the master must report the amount of that deficiency, and the sum then due upon the complainant's second bond and mortgage, separately. And the defendant Crandall, who is primarily liable for the amount due on both of those bonds and mortgages, must be decreed to pay such deficiency, with interest thereon from the date of such report. If it cannot be collected upon execution against him, then, upon the return of the execution against his property unsatisfied, the defendant Phelps must pay the amount of the deficiency reported due upon the complainant's first bond and mortgage, with interest; or so much thereof as shall not have been collected by execution from the defendant Crandall. The master must also, in his report, state the amount due upon the complainant's taxed bill of costs, after deducting the portion of such costs which the master is directed to pay out of the proceeds of the sale; and the defendant Phelps must pay the amount so reported due for such costs, with interest thereon from the date of the master's report. In case the proceeds of the sale shall be sufficient to pay the amount due upon the complainant's first bond and mortgage, together with that part of the costs and expenses which are directed to be paid out of such proceeds, but not sufficient to pay the amount due upon the complainant's second bond and mortgage, the master must report the amount of such deficiency; and the defendant Crandall must be directed to pay it personally.

The appellant must also pay the respondent's costs upon this appeal, to be taxed.

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It is a general rule that the complainant, in a bill of discovery, must pay the costs of the defendant.

The exception to this rule is, where the complainant shows that he has applied to the defendant to admit some fact, material to the defence of the complainant in the suit at law, which the defendant in the bill of discovery refuses to admit; but which he afterwards admits by his answer to the bill.

Where no application for a discovery is made to the defendant himself, previous to filing a bill of discovery against him, and the only application made is to his attorney, who has no information on the subject except what he has communicated to the complainant's attorney, it is not sufficient to excuse the complainant in the bill of discovery from the payment of costs.

Where a defendant in a suit at law applies to the attorney of the plaintiff, for a discovery, he should at least state to the attorney the material fact which he wishes his client to admit, to save the necessity of a bill of discovery. And if the attorney does not possess the information necessary to enable him to make the admission, the defendant should request him to communicate with his client and obtain such admission from him; and should then wait a reasonable time to enable the attorney to obtain such admission from his client.

The defendant, in an action at law, cannot file a bill in chancery to obtain from his adversary a discovery of the nature and grounds of the claim to recover against him in that action, to enable him to judge whether he has any defence. But the complainant must state, in his bill, the facts which exist, and which he supposes will constitute a good defence to such action; so that the court may see that if the facts, of which a discovery is sought, are admitted by the answer, they will assist in establishing the defence stated in the bill.

The defendant in a suit at law brought against him as acceptor of a bill of exchange, by the payee of such bill, is not entitled to a discovery, from the plaintiff, as to the genuineness of the acceptance, upon a bill which charges, upon information and belief, that such acceptance is a forgery.

The endorser of a draft, who has paid or secured the amount thereof to the endorsee, and has taken a transfer of the draft, has a right to sue the acceptor, and to recover, for his own use, the same amount which the endorsee could have recovered in a suit upon the acceptance.

It is immaterial, in such a case, whether the endorser, on procuring the transfer of the draft and acceptance, has paid the endorsee the amount thereof, or has given him security for such payment.

So if the endorsee has relinquished his claim upon such acceptance, to the endorser, for a mere nominal consideration, that circumstance will not vary the amount of the recovery in an action brought by the endorser against the acceptor.

THIS was an appeal by the complainant, from an order of the vice chancellor of the first circuit, dissolving the injunction

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which had been granted in this cause, upon a bill of discovery, and directing the appellant to pay the respondent's costs. The bill was filed for a discovery in aid of the complainant's defence to a suit at law, upon an acceptance purporting to have been made by him, but which he charged to be a forgery. The facts, as admitted in the answer of the defendant, were substantially as follows: In September, 1839, J. B. Chapman, then of Richmond in Virginia, but who is now dead, had in his possession a draft drawn by himself, upon the complainant Deas, for \$1100, payable to the order of the defendant Harvie, sixty days after date, and purporting to have been accepted by Deas; which draft he presented to Harvie, and requested him to put his name upon it as an endorser, for the accommodation of the drawer. This draft was discounted at the Bank of Virginia for the benefit of Chapman; and not being paid when it became due, it was protested for non-payment. The bank afterwards sued the drawer and the endorser of the draft, and recovered separate judgments against them in Virginia, and a part of the debt was collected from Chapman the drawer. Harvie, the endorser, afterwards settled with the bank for the residue of the debt, by giving a mortgage therefor upon his real estate; and the bank thereupon transferred to him, as the endorser of the draft, all their claim against Deas, as the acceptor thereof. A short time previous to this settlement with the bank, a suit was instituted against Deas, upon the acceptance, in the name of Harvie, in the superior court in the city of New-York. And after such settlement, Deas called upon the attorney of Harvie in that suit, for information as to the consideration paid by his client; and was shown by him a letter from the attorney in Richmond who sent him the draft to be collected for Harvie, to which letter was attached a certificate of the court in Virginia showing the recovery of the two judgments. The attorney of Harvey was also applied to for a statement of the facts and circumstances connected with the draft; but he refused to give any information on the subject until he should be informed of the object of the inquiries made. The attorney of Deas then wrote to Harvie's attorney, stating that Chapman was indebted

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to his client, who never had had any transactions with Harvie, and had no recollection of having accepted the draft; and therefore claimed a right to know who was the real plaintiff in the suit, and in what right he claimed to recover. The attorney replied that his client Harvie was the real plaintiff, and the suit was prosecuted for his benefit, he having taken up the draft because he was forced to pay it; stating that his information was from the gentleman who sent him the demand for collection, but that he did not wish to be bound by that statement, as the persons whom he represented resided in Virginia, and he could not apply to them for information on that subject.

The complainant thereupon filed the bill in this cause, stating, among other things, that he never received any value for this acceptance, nor did he give it for the accommodation of any one, and that he never had any connection with it; and charging, upon his belief, that the acceptance was a forgery. The defendant Harvie having put in a full answer to the bill, the vice chancellor made the usual order for the dissolution of the injunction, and for the payment of the defendant's costs.

The following opinion was delivered by the vice chancellor.

SANDFORD, V. C. The complainant accedes to the general rule, that a defendant in a bill of discovery, who has answered fully, is entitled to his costs. He relies for exemption from the rule, on his having first applied to the defendant for the desired information before filing his bill; and that the defendant refused the discovery which he has since made in his answer. The only applications, which by the admissions in the answer are proved to have been made, were first for information as to the consideration paid by the defendant for the acceptance in question; and *secondly*, an inquiry whether the defendant was the real plaintiff in the suit at law, or who was such plaintiff, and how and in what right he claimed against the complainant. It appears that Mr. Harvie's attorney replied to the latter inquiry, stating that Mr. Harvie was the real plaintiff at law, prosecuting for his own benefit, having taken up the acceptance

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and been forced to pay it. The declaration at law disclosed to Lieut. Deas that Mr. Harvie stood as first endorser upon the bill : and the certificate from the clerk of the superior court at Richmond, exhibited to the attorney for Lieut. Deas, apprised him that judgment had been obtained against Mr. Harvie and the drawer respectively, on the acceptance, by the Bank of Virginia. Taken together the information communicated was, that Mr. Harvie, as first endorser, had been sued to judgment by the holders of the bill ; that he had thereupon settled with and paid such holders, and received the bill itself from the files of the court in Virginia ; and that he had as the first endorser of the bill, and for his own benefit, commenced the suit on it here against the acceptor.

It appears to me that all the inquiries, made before filing the bill, were answered by Mr. Harvie's attorney. The answer of Mr. Harvie to the bill of discovery, discloses nothing which is claimed to be inconsistent with what was before communicated, except that it appears he settled with the bank for considerably less than the face of the bill ; and, although his arrangement was agreed upon, and the bill delivered to him before he brought his suit at law, yet he did not pay the holders. He merely secured them by a conveyance of lands in trust, in the nature of a mortgage, and such conveyance, through his misapprehension, was not executed till after the bill of discovery was filed.

On the question of costs, it is wholly immaterial what discoveries the complainant has made by his bill, provided they are of matters respecting which no inquiry was made of the adverse party before proceeding in equity.

The sole point in this case, therefore, is whether the inconsistency just stated is material to Lieut. Deas's defence at law. As to the sum paid or agreed to be paid by Mr. Harvie, there is really no inconsistency. The form of declaring at law, does not require the plaintiff to state the precise amount which he claims, nor is it often stated in practice. And the inquiries put by the attorney for Lieut. Deas, did not call for any thing on this subject specifically.

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Then as to the mode in which Mr. Harvie adjusted the judgment of the bank. I think it was sufficient to give him a right to enforce the bill. The bank agreed to receive a different security, and delivered the bill to him, thereby relinquishing to him their claim against the acceptor.

There is much doubt in my mind, whether the inquiries put to Mr. Harvie's attorney, were sufficiently pointed and definite to warrant the claim made here for exemption from the costs of the discovery. It is probable that Lieut. Deas's ignorance of the grounds of the claim, caused the indefinite mode of inquiry, which was adopted; but that is not a ground for refusing costs to the defendant.

If, as was suggested, this were in truth a fishing bill, the complainant must pay the customary penalty for what he has extracted in the way of discovery. Bills of that character are not favored in this court. Without reference to that consideration, I am compelled to say that in my judgment there is not sufficient in the case to relieve the complainant from costs.

Order that injunction be dissolved, and that the complainant pay the costs of the suit.

T. Sedgwick, for the appellant. I. The request for discovery was sufficient. No other could be made. II. The answer to this request was *insufficient*; and the refusal to give further information well warranted the filing of this bill. The answer is evasive and untrue. III. The discovery obtained is such, when coupled with the incorrect character of the information given, as to relieve the complainant from costs. 1st. It now appears that only *half the draft* is due. 2d. Harvie was discharged by the irregular presentment. He took it up in his own wrong, and can acquire no rights by so doing. 3d. He has not *paid* the draft at all. He has only secured it by a mortgage, and cannot sue as for money paid. He does not sue as trustee for the bank. 4th. When the suit at law was brought, the plaintiff's cause of action had not accrued. The suit was brought on the 25th of March, 1845. The agreement with the bank was made on the 22d of April, 1845, and the trust deed

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was executed on the 2d of July, 1845, and the defendant avers that the suit was brought *for his own benefit* and not for the benefit of the Bank of Virginia. It follows that when the suit at law was brought, the plaintiff had no right to sue. IV. The complainant having obtained a discovery material to his defence at law, and which was unreasonably refused before bill filed, should not be charged with the costs of the suit.

O. L. Barbour, for the respondent. I. The principle upon which costs are given or refused in these cases is laid down in *King v. Clark*, (3 *Paige*, 76,) and in 4 *John*. 504. It is this. If the complainant wishes to avoid paying costs, he must ask for a discovery of the facts he wishes an admission of; and if it is refused and he obtains the information by the bill, costs are refused to the defendant. This is the only rule applicable to such cases. The court does not look into the merits, and see if the answer admits a good defence, or an available one. In this case there was no proper application by the complainant for a discovery, and no refusal. The inquiries contained in the note of the defendant's attorney, so far as they were specific, were answered fully by Smith's note, *so far as he knew* the facts inquired about; and he knew no more than was contained in the note, and in the record which he showed the defendant's attorney.

II. The application made by the defendant's attorney to Smith, the plaintiff's attorney, for a "full discovery," was too indefinite. The application should have required him to admit some distinct fact or facts, and should not have been a mere *pump-*
ing question. It would be impossible to answer such a question so as to satisfy the rule. And the party had no more right, while making that application, to fish for something which might possibly benefit him, without specifying, particularly, what he wanted, than he would have to file a fishing bill of discovery. The party was not bound to make any answer to vague and loose surmises. (See *Story's Eq. Jurisp.* p. 263, *as to fishing bills*. See also *Newkirk v. Willett*, 2 *Caines' Cas. in Er.* 296. *Fritas v. Dos Santos*, 1 *Young & Jer.* 577.)

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III. Harvie, in his answer, answers for himself that he has fully given every information asked of him. IV. The Bank of Virginia who had discounted the draft could sue all the parties on it. No protest was necessary as to the complainant, who was acceptor; and the bank having a good right of action against the acceptor, might transfer it to any person; who might sue in his own name, and without paying any consideration whatever. It was contended by the counsel for the appellant, before the vice chancellor, that the pretended settlement between the defendant and the bank, made by his giving his note and trust deed, was no payment, so as to enable him to sue; and 4 *Pick.* 444, 18 *Mass. Rep.* 40, and 2 *John. Cas.* 75, were cited in support of this position. But these cases show clearly that if a party gives his negotiable note for a debt which is discharged, then it is payment, so as to enable an endorser to sue for money paid. Besides, here was an execution levied. The presumption will be in favor of its being a negotiable note. It is evident from the whole language of the answer, that the obligation of Harvie was received by the bank in discharge of his debt; or why should the bank have delivered up to him the acceptance? V. If the discovery obtained from Smith, the attorney, was insufficient, it was the party's own fault, in not applying to the right person. It is not to be presumed that a party residing in another state, on sending a note for collection, should communicate, at first, every particular relating to its concoction, how he came into possession of it, &c.

VI. The demand for discovery was not in the proper form, nor made of the proper person. It was made of the attorney, instead of the party himself. The *attorney* was requested "to make a full disclosure." And thereupon a correspondence took place; in which Mr. Sedgwick says, "I hope you will consider *yourself* at liberty to let me know the grounds of your suit." And the complainant, in his bill, says the information derived from the correspondence "is the only information which he has been able to obtain in this matter from the *attorney* of said plaintiff." The bill nowhere alleges that the complainant has not been able to obtain any information from the *plaintiff*, or

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that any application had been made to him. The attorney was not the proper person to apply to for a discovery. 1. Because he was not the person most likely to possess the information; and 2d. Because the attorney is not *bound*, and would not be *allowed*, to disclose matters communicated to him by his client. (*Hare on Dis.* 163, 173. *Greenough v. Gaskell*, 1 *My. & Keen*, 100. *Wigram on Dis.* 62, and cases there cited. *Id.* 196.) In *Bolton v. Corp. of Liverpool*, (1 *My. & Keen*, 88,) it was held that the complainant was not entitled to a discovery of cases and title deeds laid before counsel. It is a general rule that a discovery will not be compelled where it would subject the defendant to a penalty, &c., or would be in violation of professional confidence. (*Welf. Eq. Pl.* 119, 123 to 127. *March v. Davison*, 9 *Paige*, 580.) Mr. Hare says, "It would seem that an attorney, who is not a party to the suit, cannot be compelled, on motion, to produce papers belonging to his client, who is a party; even if the client himself could be compelled to produce them." (*Hare on Dis.* 173, and cases there cited.) The defendant was bound, on the receipt of Mr. Smith's letter giving all the information which *he* possessed, either to ask Smith to communicate with Harvie, and get a discovery, or to write to Harvie, himself, asking for the information he wanted. But he did neither. He contented himself with applying to the attorney for such information as he might happen to possess, on the subject; and because the information obtained from *him* did not suit him, he files a bill of discovery; without making application to Harvie, or even asking Smith to apply to him.

VII. There was no refusal of the discovery. Smith, immediately after being applied to by Mr. Sedgwick, gave him a full disclosure of all the facts within his knowledge. And as there was no *application* made to Harvie, of course there could not have been any refusal by *him*. VIII. As respects costs, the general rule is that the complainant in a bill of discovery, upon obtaining it, pays the defendant his costs. (*Burnett v. Saunders*, 4 *John. Ch. Rep.* 504. 1 *Hill's Ch. Rep. (So. Car.)* 34. *Coop Pl.* 61.) And costs are given against the complainant

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of course, if the charges in the bill are denied. (*King v. Clark*, 3 *Paige*, 76.) But if the complainant, before filing his bill, asks a discovery from the defendant, who refuses it, whereby the complainant is compelled to come into equity, the defendant will not be allowed costs. (*Id. ib. McElwee v. Sutton*, 1 *Hill's Ch. Rep.* 34. 4 *John. Ch. Rep.* 504. 1 *Ves. Jun.* 423.) Here no proper application for a discovery was made, and no refusal given; and the complainant having obtained from the answer of the defendant, all the information it was in his power to furnish, the defendant is entitled to his costs.

THE CHANCELLOR. The complainant's bill having been fully answered, it was a matter of course to dissolve the injunction, which restrained the further prosecution of the suit at law until the discovery should have been obtained. And I do not see any thing in this case to take it out of the general rule that the complainant in a bill of discovery must pay the costs of the defendant. The exception to this general rule is where the complainant shows that he has applied to the defendant to admit some fact, which is material to the defence of the complainant in the suit at law, which the defendant in the bill of discovery refuses to admit; but which he afterwards admits in his answer to the bill.

In this case no application for a discovery was made to the defendant. And the application to the attorney, who had no information from his client on the subject, beyond what was communicated to the complainant's attorney, was not sufficient to excuse the complainant from the payment of costs. He should at least have stated to the attorney the material fact which he wished his client to admit, to save the necessity of a bill of discovery, and should have requested him to communicate with his client and obtain such admission. And he should then have waited a reasonable time to enable the attorney to obtain such admission from his client. In this case, however, the defendant himself was not bound to furnish the complainant with information to enable him to judge whether he had any defence to the suit; and to obtain such information appears

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in fact to have been the whole object of the bill. For, although this bill contains a charge, upon the belief of the complainant, that the acceptance upon which the suit at law was founded was a forgery, it could not have been expected that the defendant in this cause could be compelled to admit that he was aware of that fact; which would subject him to a prosecution for a felony for uttering and publishing the forged acceptance as true, with intent to defraud the complainant. The defendant in the action at law cannot file a bill in chancery to obtain from his adversary a discovery of the nature and grounds of the claim to recover against him in that suit. But the complainant must state in his bill the facts which exist, and which he supposes will constitute a good defence to such action, so that the court in which the bill of discovery is filed may see that if the facts of which a discovery is sought are admitted by the answer of the defendant, they will assist in the establishing of the defence stated in the bill.

In this case, the answer of the defendant does not admit any fact charged in the bill, proving, or tending to prove, that the acceptance was a forgery, or that it was obtained from the complainant without consideration, or that this defendant gave no consideration for it. And the bill states in express terms that it was not an accommodation acceptance. The complainant, therefore, has not obtained from the defendant any discovery which can aid him in establishing the only defences to the action at law which are stated in the bill. For it is wholly immaterial whether Harvie paid the bank for the transfer of the draft and acceptance, or gave them security for such payment. The defendant having been made liable to the bank, on account of his endorsement, for the whole of the draft except what had been recovered of Chapman, exclusive of the costs of both suits, which Chapman was bound to indemnify him against as an accommodation acceptor, he had a right to settle with the bank upon such terms as they might think proper to require. And by the transfer of the interest of the bank in the draft and acceptance to him, he obtained a right to recover, for his own use, from the acceptor, the same amount which the bank itself

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could have recovered, in the name of Harvie or otherwise, in a suit instituted for the benefit of the bank against Deas upon his acceptance. The suit in the superior court was probably instituted in the name of Harvie, the payee of the draft, for the benefit of, and with the assent of, the bank, as well as to protect Harvie from his liability upon the judgment against him as endorser. At least, there is no allegation in the bill that the suit was brought in his name without the authority of the bank. And at the time the attorney was applied to for information on the subject, that suit was in fact prosecuted for the benefit of Harvie; he having then settled with the bank, so as to authorize him to continue the suit for his own benefit exclusively. It is then wholly immaterial whether he paid more or less to the bank upon the settlement which he made with it, in April, 1845. And even if the bank had relinquished its claim upon this acceptance, to Harvie, upon a mere nominal consideration, it would not have varied the amount of the recovery, in the action against the acceptor.

The order appealed from is not erroneous, and it must be affirmed with costs.

 BOUGHTON and ROWELL vs. THE BANK OF ORLEANS and POND.

Whether one of the defendants in an execution, who is a mere surety for his co-defendant, has any remedy in the court of chancery against a sheriff who has an execution against both, and who, with the knowledge of the fact that one of such defendants is primarily and equitably liable for the whole debt, neglects to sell the property of the principal debtor, whereby the same is lost; and where such sheriff is subsequently proceeding, upon the execution, against the property of the surety? *Quære.*

Where the question of primary liability, as between the defendants in an execution, is doubtful, the sheriff is not bound, at his peril, to decide upon the conflicting claims of the defendants to equity, as between themselves.

In such a case, if the defendant who claims to be the surety wishes to have the execution enforced against his co-defendant, who is primarily liable for the payment

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of the judgment, he should apply to the equitable powers of the court of which the execution issued, upon due notice to his co-defendant, for a direction to the sheriff to resort to the property of such co-defendant in the first place.

As between the principal debtor and his surety, the property of the former is primarily liable, and should be first resorted to, for the payment of the debt. And where the sheriff, with a full knowledge of the facts, wilfully violates the principle of equity in this respect, the court of chancery, upon a bill filed for that purpose, will relieve the surety, if the surety cannot obtain satisfaction for the injury by an action upon the case against the sheriff.

The interest of a person holding a contract for the purchase of land, is not bound by the docketing of a judgment against him; and his interest in the land cannot be sold by execution upon such judgment.

Real estate held in that manner forms an exception to the general rule, that the interest of a defendant in lands of which he is in possession may be sold on execution against him.

A valid and binding agreement, by a creditor, with the principal debtor, to stay the proceedings upon a judgment against the latter, if made without the consent of a surety, will, in equity, discharge the surety from any further liability to the creditor.

And if one of two joint sureties assents to such agreement for a stay of proceedings against the principal debtor, he thereby becomes liable, in equity, for the payment of the whole debt, as between him and his co-surety, if it cannot be collected of the principal debtor.

THIS was an appeal from a decree of the vice chancellor of the eighth circuit, allowing the demurrer of E. Pond, one of the defendants, and dismissing the complainant's bill, as to him, with costs. The facts of the case as stated in the bill were substantially as follows:

The complainants and A. Darling made a promissory note, for the benefit of Darling, payable to the Bank of Orleans; which note upon its face showed that it was signed by the complainants merely as the sureties of Darling. The note was discounted by the bank, for the benefit of Darling, and not being paid when it became due, the bank brought a suit thereon against all the makers, and recovered a judgment against them jointly, in the supreme court, on the 7th of July, 1837. A few days after the entry of the judgment an execution was issued thereon, against the property of the judgment debtors, to E. Pond, one of the defendants in this suit, as sheriff of the county of Monroe. At that time the complainants, as well as Darling, had real estate in the county of Monroe, which was

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subject to the lien of the judgment and liable to be sold on the execution. And, as the bill alleged, Darling had sufficient property at that time to have satisfied the judgment. But the bank, without the knowledge or consent of H. Rowell, one of the complainants in this suit, made an agreement with Darling, the principal debtor, in consideration of his withdrawing his defence in another suit, to stay all proceedings for the collection of this judgment for the term of one year; and the proceedings were stayed accordingly. In the summer of 1839, Boughton and Rowell, the complainants, requested the sheriff to sell the real estate of Darling to satisfy the execution. His real estate then consisted of a farm, containing about 99 acres of land, to which he had the title, and which was subject to the lien of a mortgage which was prior to the judgment, and about 87 acres of land which he was in possession of under a contract of purchase from Rowell, one of the complainants, and upon which contract a small part of the purchase money had been paid. And the bill alleged that these two pieces of land were worth more than enough to pay the amounts due upon the judgment and upon the prior mortgage on the 99 acres thereof. The sheriff, thereupon, advertised the two pieces of land to be sold, on the execution, in October, 1839. And the complainants engaged H. C. Smith, as their agent and friend, to attend the sale and bid upon the two pieces of land to the full amount of the judgment. He attended accordingly, at the time and place appointed for the sale, and offered to bid to the amount of the judgment, and to pay his bid; but the sheriff neglected or refused to sell the property, and never afterwards attempted to sell the same. The farm subsequently became depreciated in value, by waste and otherwise, so that upon a foreclosure of the mortgage the 99 acres, upon which it was a prior lien, only sold for sufficient to pay the amount due upon such mortgage and the costs of foreclosure. Darling, in the meantime, had become insolvent, and had died, leaving no property of any value except his interest in the 99 acres of the farm upon which the mortgage was a lien.

Subsequent to the foreclosure and sale under the mortgage,

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the sheriff attempted to enforce the execution against the lands of the complainants, respectively, upon which the judgment was a lien; giving out as a reason why he neglected to sell the lands of Darling in 1839, some pretended orders from the agents of the bank to refrain from selling the same under the execution. But to a bill filed by the complainants against the bank to restrain proceedings against their individual property, the bank put in an answer denying that its agents or officers ever gave the sheriff any instructions not to proceed and sell the lands of Darling; and the sheriff being unable to furnish the complainants with any evidence of the fact of such directions, they dismissed their bill in that suit. And in January, 1843, they filed their bill in this cause, charging the matters above specified, and also stating that at the time of the sheriff's neglect or refusal to proceed and sell the lands of Darling, the sheriff, as well as the bank, knew that the complainants were mere sureties for the amount of the judgment, and that Darling was the real debtor. The complainants further stated, that they were ignorant whether the neglect of the sheriff to proceed and sell the lands of Darling, upon the execution, was occasioned by the instructions of the agents or officers of the bank, as alleged by him, or by his own wrongful act, as insisted by the bank in its answer in the former suit. The bill therefore contained a prayer in the alternative, that if the wrong in not selling the property of Darling upon the execution was the fault of the sheriff exclusively, he might be restrained from selling the property of the complainants upon the execution, and might be decreed to pay the amount of the judgment to the bank; or if otherwise, that the bank and the sheriff might both be perpetually enjoined from proceeding against the complainants, by the execution or otherwise, to collect the amount due upon the judgment; or that the complainants might have such other or further relief in the premises as should be just.

The defendant E. Pond, the sheriff, demurred to the bill for want of equity; and also because the suit was not commenced within three years after the right of the complainants accrued; and likewise upon the ground that their remedy, if any, was

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at law. The vice chancellor decided that the sheriff was not a proper party for any purpose ; and that if the complainants had any remedy against him on account of the loss charged to have been sustained by them in consequence of his improper conduct, or negligence, in not selling the property of the principal debtor upon the execution, which he thought they had not, it was only by an action on the case. He therefore made the decree appealed from, as to the defendant Pond.

S. Boughton, for the appellants.

G. H. Mumford, for the respondent.

THE CHANCELLOR. It is not necessary to examine the question, in this case, whether one of the defendants in an execution, who is a mere surety for his co-defendant, has any remedy in this court against a sheriff who has an execution against both, and who, with the full knowledge of the fact that one of the defendants in such execution is primarily and equitably liable for the whole debt, neglects to sell the property of such principal debtor, whereby the same is lost ; and where such sheriff is subsequently proceeding upon the execution against the property of the surety. It is certain that in a case where the question of primary liability is doubtful, the sheriff is not bound, at his peril, to decide upon the conflicting claims of the defendants to equity as between themselves. For in such a case, if the defendant who claims to be the surety wishes to have the execution enforced against his co-defendant, who he insists is primarily liable for the payment of the judgment, he should apply to the equitable powers of the court out of which the execution issued, upon due notice to his co-defendant, for a direction to the sheriff to resort to the property of such co-defendant in the first place. But the principle of equity is well established that the property of the principal debtor is primarily liable, and should be first resorted to. And if the sheriff, with a full knowledge of the facts, wilfully violates the principle of equity in this respect, the surety certainly is not without reme-

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dy. For if he cannot recover in an action upon the case against the sheriff, this court ought, unquestionably, to grant him relief, upon a bill filed for that purpose.

In the case under consideration, however, the bill does not show that the complainants have become charged with the payment of this debt in consequence of the wrongful act of the sheriff. For it is not shown that the debt could have been collected out of the property of Darling, at the time the sheriff refused to proceed and sell the farm, in October, 1839.

It is indeed alleged that the value of the two pieces of land, of which the farm was composed, was sufficient to pay the judgment and mortgage at that time; and that the agent of the complainants offered to bid upon both pieces to the full amount of the execution, and to pay his bid. But the title to the 87 acre piece was not in the defendant Darling, and that part of the farm could only be sold, upon the execution, as the property of Rowell, one of the sureties. For by the express terms of the revised statutes, the interest of a person holding a contract for the purchase of lands, is not bound by the docketing of a judgment; and his interest in the land, as the purchaser, cannot be sold by execution upon such judgment. (1 R. S. 744, § 4.) Property thus held under a contract now forms an exception to the general rule, that the interest of a defendant in lands of which he is in possession, may be sold on execution. (*Griffin v. Spencer*, 6 *Hill's Rep.* 525. *Talbot v. Chamberlin*, 3 *Paige's Rep.* 219.) It is true, the judgment was a lien upon the legal title of Rowell, one of the sureties in such judgment, and upon his interest in the land; which interest was equal to the amount of the purchase money still due to him. But the purchaser under the execution would have taken such legal title subject to the equitable right of Darling to the land, upon the payment of the balance of the purchase money due upon the contract; which equitable right of Darling would not have been divested by the sheriff's sale. Nor would the purchaser have acquired the right to the possession of the land, as against Darling, by that sale, unless Rowell, the vendor in the contract, would have been entitled to the possession if no

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sale thereof under the execution had been made. No right whatever, as against the principal debtor's interest in the land, would have been acquired by the sale of the 87 acre lot under the execution. (*Grosvenor v. Allen*, 9 *Paige's Rep.* 74.) The appellants, therefore, cannot complain that the sheriff did not sell the interest of one of them in that part of the farm, upon the execution. And I have not been able to find any allegation in the bill which shows that the 99 acre lot, at any time after the execution came into the hands of the sheriff, was of sufficient value to pay the amount of the judgment, or any part of it, in addition to the amount of the mortgage which was a prior lien upon that part of the farm of Darling.

There is indeed an allegation in the bill, that at the time of the recovery of the judgment, Darling had sufficient real and personal estate to satisfy the judgment, if due diligence had been used in its collection. And perhaps it may be fairly inferred that such real and personal estate was in the county of Monroe; although that is not expressly stated in the bill. But the sheriff is neither legally nor equitably liable to the complainants for not levying upon and selling the property at that time. For it is not stated that any personal estate which was liable to levy and sale, was in the possession of Darling at the time the execution came to the hands of the sheriff; which was several days after the judgment was entered.

Again; the bill shows that the officers or agents of the bank made a valid and binding agreement with Darling to stay the proceedings upon the judgment against him, for a year; and that this was done without the knowledge or consent of the complainant Rowell. This, of course, discharged Rowell, in equity, from any further liability to the bank as one of the sureties of Darling. And if Boughton assented to that stay of proceedings, as I infer he did, he thereby became liable, in equity, for the payment of the whole judgment, as between him and Rowell his co-surety; if it could not be collected of Darling, the principal debtor. And the sheriff could not be liable to the complainant Rowell for any neglect to levy on and sell the property of Darling, during the time that the bank had stayed

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the proceedings without Rowell's knowledge or consent. Nor could the complainant Boughton complain that the sheriff acted upon the agreement between Darling and the bank, to which Boughton, as one of the sureties, had himself assented.

The two complainants, therefore, have separate and distinct rights and interests in this matter, upon the case attempted to be made by this bill; and they should not have joined in one suit. If the allegation in the bill is true, as to the agreement made by the bank, to stay the proceedings, about the time of the recovery of the judgment, Rowell has a right to file a separate bill against the bank to stay all further proceedings against him upon the judgment; upon the ground that such agreement was an equitable discharge of his liability as surety. But if Boughton assented to that stay of proceedings, he was not discharged thereby; and he should not have joined with Rowell in a bill, against the bank, for relief on that ground. On the other hand, if Rowell was discharged from his liability by this act of the officers or agents of the bank, as the statements in the bill clearly show that he was, he has not been injured by any subsequent neglect of the sheriff to proceed and sell the farm of Darling, upon the execution. And he should not have joined with Boughton in a bill, against the sheriff, to obtain relief on that ground; as Boughton was the only person who had a legal right to complain of that act, or rather that omission of duty by the sheriff.

In any view which I have been able to take of this case, therefore, the bill of the complainants cannot be sustained against the respondents. And the decree appealed from must be affirmed, with costs.

CHAZOURNES vs. MILLS and others.

The objection that the complainant has submitted to the master's report, upon exceptions taken to the answer to the original bill, and that the amendments to the bill do not make a new case calling for a further discovery, cannot be raised by demurrer to the discovery sought by such amended bill.

A complainant who neglects to except to the answer to his original bill, or whose exceptions thereto have been overruled, cannot except to the answer to his amended bill, for insufficiency, upon the ground that the original bill was not fully answered.

Where the complainant, after excepting to the answer of the defendant and submitting to the master's report thereon, files an amended bill asking for a discovery, without making any new case entitling him to a further discovery, the proper course for the defendant—if the discovery sought is not wholly immaterial, so as to make it a proper subject of demurrer—is to answer the amended bill without reference to the discovery sought. And then, if the complainant excepts to his answer for insufficiency upon that ground, he may move to take the exceptions off the files, for irregularity. Or he may insist before the master, upon the reference of the exceptions, that such exceptions relate to the matters of the original bill only; or that the principle upon which the discovery is sought has been decided against the complainant, upon the reference of the exceptions to the original answer.

Upon a demurrer to an amended bill, if any part of the discovery covered by such demurrer appears to be material and proper, for any purpose of the suit, the demurrer will be overruled. And the defendant cannot, upon the argument of the demurrer, insist that the discovery called for is contained in his former answer.

THIS was an appeal, by the complainant, from an order of the vice chancellor of the first circuit, allowing the demurrers of the defendants P. L. Mills and T. C. Winthrop. The complainant recovered a judgment against the defendant P. L. Mills, who had failed in business some years since. That judgment was recently revived by *scire facias*, and an execution was issued against the property of the judgment debtor which was subsequently returned unsatisfied. This bill was thereupon filed to reach the equitable interests, choses in action, and other property of the judgment debtor, and to have it applied to the payment of the complainant's debt. In addition to the usual allegations in a creditor's bill, the complainant charged, in substance, that certain partnership business, carried on by

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the defendant P. L. Mills, and others, in the names of his brother and other persons, and in relation to which he acted ostensibly as their clerk, was in fact carried on, in part, for his use and benefit; and that his interest in the proceeds and earnings of that copartnership business had been conveyed to the defendant Winthrop, nominally for the use and benefit of the wife and children of P. L. Mills, but in reality for the use of Mills himself, for the purpose of defrauding the complainant and other creditors of Mills. Winthrop the trustee, and the wife and children of P. L. Mills, were made defendants in the suit. And the complainant prayed a discovery of the situation, nature and amount of the fund at the time of the filing of the complainant's bill, and at other times in such bill mentioned; and in whose name, and in what securities, &c. it was invested and held. An answer was put in to the original bill, and the bill was subsequently amended; and further answers were put in to parts of the amended bill. But to all such parts of the amended bill as sought a discovery as to whether the funds, referred to in the amended bill as having been conveyed to Winthrop, and left in the hands of P. L. Mills, or under his control, remained undiminished in their hands at the time of filing the bill, and whether certain real estate, specified in the bill, was a part of such funds; or as to the situation and particulars of the fund at the several times mentioned in such amended bill; or what sums were paid from time to time for the support of the defendant P. L. Mills and his family, and the amount of the indebtedness, if any, of P. L. Mills to the copartnership at the several times mentioned and inquired of in the bill, the defendants respectively demurred.

J. S. Sandford, for the appellant. I. The bill is filed for relief against fraudulent dispositions of property by a judgment debtor. The demurrer being to a portion of the discovery sought, and not to any part of the relief, it cannot be sustained, if it can be supposed that the discovery may in any way be material to the complainant, in the support of his suit. (*Mitf Pl. by Jeremy*, 193. *Story's Eq. Pl.* 431, § 567. *Id.* 454,

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§ 595. *Id.* 455, § 596. 2 *Daniel's Ch. Pr.* 56. *Kuypers v. Ref. Dutch Church*, 6 *Paige*, 570. *Per V. C. Wigram*, in 9 *Lond. Jurist Rep.* 987. *Harris v. Harris*, reported in 4 *N. Y. Legal Observer*, 4, and 4 *Hare's Rep.* 79.) II. Here not only can it be supposed that the discovery may be material, but it is obvious that it may, and probably will, be material, from the nature of the case. The management of property of ten furnishes evidence of fraud, in these cases. This shows that the discovery may be material. III. The express allegation in the bill, that the discovery, if made, will show, or enable the complainant to prove, that the debtor managed and controlled the property, leaves no room for argument. It goes far beyond the point as expressed in the treatises and judgments, and establishes positively that the discovery is material and necessary. IV. The demurrer should be overruled with costs, and the order appealed from reversed with costs, and proceedings remitted.

T. Sedgwick, for the respondents. I. The part of the amended bill demurred to is altogether immaterial, and the complainant is not entitled to a discovery. The defendant Winthrop is a trustee for third parties, the wife and infant children of P. L. Mills, who are entitled to the protection of this court. It was perfectly competent for him to make P. L. Mills his agent. Any improper intermeddling by P. L. Mills with the funds might prove negligence or fraud in the trustee, but would have no tendency to affect the rights of the cestui que trust. (1 *Daniel's Ch. Pr.* 602.) III. The inquiry in the bill could only be made material by some distinct averment of the facts which the complainant expects to be able to prove, and which facts would go to show the trust a fraudulent one. There is no such averment in the bill. As to this inquiry, the bill is a mere fishing bill. IV. The averment in the bill that the discovery is necessary, has no tendency to make it so. The question is one for the court, on the whole case.

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THE CHANCELLOR. The objection that the complainant has submitted to the master's report upon the exceptions to the answer to the original bill, and that the amendments do not make any new case calling for a discovery, cannot be raised by a demurrer to the discovery now sought. The former answer and exceptions thereto, and the master's report, are not before me upon this appeal; nor could they properly be brought before the court upon a demurrer to the amended bill.

It is true, a complainant who neglects to except to the answer to the original bill, or whose exceptions thereto have been overruled, cannot except to the answer to the amended bill for insufficiency, upon the ground that the original bill was not fully answered. (*Ovey v. Leighton*, 2 Sim. & Stu. Rep. 234.) The proper course for these defendants, therefore, if the discovery sought was not wholly immaterial, so as to make it a proper subject of demurrer, was to answer the amended bill without reference to such discovery. And then, if the complainant excepted to their answers for insufficiency, upon that ground, they would have been in a situation to move to take the exceptions off the files for irregularity. Or they might have urged the objection before the master, upon the reference of the exceptions, that those exceptions related to the matter of the original bill only; or that the principle upon which the discovery was sought had been decided against the complainant, upon the reference of the exceptions to the original answer. (*Bennington Iron Co. v. Campbell*, 2 Paige's Rep. 160.) But upon a demurrer to an amended bill, if any part of the discovery covered by such demurrer appears to be material and proper, for any purpose of the suit, the demurrer must be overruled. And the defendant cannot, upon the argument of the demurrer, insist that the discovery called for is contained in his former answer; for if so, that of itself would show that the demurrer was improper, and would overrule it as covering too much.

Upon the merits of these demurrers, I think they cover too much; even if the complainant is not entitled to a discovery of the situation of the fund and the manner in which it was invested, at the different times stated in the bill, previous to the

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filing of the bill itself. For, if the complainant can succeed at all in this suit, it is essential to the relief prayed for, that the nature and situation of the fund in question, as well as the amount thereof, at the time of filing the bill, and the answers thereto, should be disclosed, so that the property and securities in which it is invested may be traced and identified; to the end that they may be reached by the decree, and applied to the payment of the complainant's debt. The demurrers, therefore, should have been overruled.

The decretal order appealed from must be reversed, without costs to either party; and the demurrers of the respondents respectively must be overruled with costs. If exceptions are filed to the further answers, within twenty days after the entering of the decree upon this appeal, and if such exceptions are submitted to or allowed, the defendants respectively must answer the exceptions and pay the costs of the hearing, upon their several demurrers, within forty days after such exceptions are submitted to or allowed, or the bill must be taken as confessed against them; unless the time for answering those exceptions is further extended by the court having jurisdiction of the matter. The overruling of the demurrers, however, must be without prejudice to the rights of the defendants to insist, upon the reference of any such exceptions, that the amended bill is fully answered, so far as the amendments are concerned, or that any particular parts of the discovery covered by the demurrers is immaterial or irrelevant, or that it should have been called for by exceptions to the original bill.

Decree accordingly.

WHITESIDE and others, adm'rs, &c. vs. PRENDERGAST.

Where the bond given by a receiver, upon his appointment, is not filed in the proper office, through inadvertence, the court may direct it to be filed *nunc pro tunc*.

The discontinuance of a suit does not discharge a receiver appointed therein. But it will entitle him to apply for his discharge, and to have his account passed, so that he may pay over the balance, if any in his hands, and exonerate himself and his sureties from further liability; unless the interests of the defendants require that he should continue in the receivership, to protect their rights.

Where the protection of the rights of a defendant requires the continuance of the receiver, the court will not grant a discharge, although the suit is at an end. But it will require the defendant thus protected to file a bill forthwith, to settle his rights.

The complainant in a suit is a necessary party to an appeal from an order, of a vice chancellor, granting leave to file the bond of the receiver in such suit *nunc pro tunc*.

THIS was an appeal, from an order of the late vice chancellor of the eighth circuit, directing the bond of the receiver appointed in this cause to be filed *nunc pro tunc*. The suit was brought by the representatives of a deceased partner, against a surviving copartner, for an account and settlement of the copartnership transactions. And an order was made, in February, 1836, appointing J. Brooks receiver of the partnership effects connected with the store at Mayville; upon his filing a bond, with such sureties as should be approved of by the parties in this suit, or by a master, conditioned for the faithful performance of the duties of his office as such receiver. A bond was thereupon executed by the receiver, and by the other appellants as his sureties. And it was delivered to the solicitor of the complainants to be filed, after having been approved of by the parties; but, through inadvertence, it was not filed with the clerk of the court. The receiver, however, demanded and received from the defendant, the property, books, and securities of the firm at Mayville, as directed by the order of the court. The parties afterwards referred the matter in controversy in this suit to referees; and, by consent, a decree was made, pursuant to the award of the arbitrators, directing the partnership effects to be divided equally between the complainants and the defendant.

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The vice chancellor directed the bond of the receiver to be filed as of the 25th of March, 1836, the day on which it would have been received by the clerk if it had been transmitted to him by mail on the day it was approved of by the parties and delivered to the complainants' solicitor to be filed; and that it should have the same effect as if it had actually been filed on the last mentioned day. The receiver and his sureties, having had notice of the application for the order to file the bond *nunc pro tunc*, appeared and opposed the motion. And they all joined in an appeal from the order, directing such filing, and gave notice of the appeal to the clerk of the court, and to the solicitor of the defendant, who applied for the order; but they neglected to take the necessary steps to make the appeal effectual as to the complainants in the suit.

C. Stevens, for the appellants.

M. T. Reynolds, for the defendant.

THE CHANCELLOR. It was no valid objection to the application that the parties in the suit had submitted the matters in controversy between them to an arbitration without the consent of the receiver. For that did not alter, or affect, his liability to account, as receiver, for the property which had come to his hands. Even if there had been a formal discontinuance of the suit, that would not have discharged him from his trust, as an officer of the court. The discontinuance of a suit does not discharge a receiver appointed therein. But it will entitle him to apply for his discharge, and to pass his account, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability; unless the interests of the defendants require that he should continue in the receivership to protect their rights. If the protection of the rights of a defendant requires the continuance of the receiver, the court will not grant a discharge although the suit is at an end; but it will require the defendant thus protected to file a

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bill forthwith, to settle his rights. (*Murrough v. French*, 2 Moll. Rep. 497. *Lougan v. Bowen*, 1 Sch. & Lef. 296.)

This appears to be a proper case therefore to direct the bond to be filed nunc pro tunc, so as to complete the appointment of the receiver, and to render him liable to account, as an officer of the court, for the property which came to his hands subsequent to the time when his bond should have been filed. Whether it will have the effect to render his sureties liable for property which had been wasted, by his negligence or misconduct, before the making of the order appealed from, is a question which does not properly arise here, and upon which it is not necessary to express an opinion. That question will properly be disposed of in the suit at law upon the bond, if it should become necessary to institute such a suit.

The appeal also seems to be defective for want of proper parties. It appears that the complainants in the suit have a common interest with the defendant in sustaining the order to file the bond nunc pro tunc. They should therefore have been served with notice of the appeal, and should also have been named in the appeal bond; or a separate bond should have been given to them upon the appeal. For that reason, instead of affirming the order of the vice chancellor, the appeal should be dismissed, with costs to be taxed.

 SMITH and others vs. VAN KUREN and others.

Where a petition was presented to a surrogate, by persons interested in the estate of a decedent, praying that the executors might be required to render an account of the administration of such estate, without asking for a settlement of the account, or for the payment of any balance which might be found due to the petitioners, or for any other relief, and the executors rendered an account accordingly, and the same was finally closed before the surrogate; *Held*, that this terminated the proceedings before the surrogate; and that he had no authority to proceed and settle the account, unless the executors asked for a final settlement thereof, or some person interested in the estate, applied for the payment of his debt, or agency

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or distributive share, so as to render a settlement of the estate necessary, as between the parties.

A decree of a surrogate which, upon its face, purports to be a final settlement of the accounts of executors, and which discharges them from all further responsibility on account of the personal estate of their testator, upon payment of the several sums specified therein, may be appealed from at any time within three months.

Where a decree, by a surrogate, for the final settlement of the account of an executor, is erroneous, because the surrogate had no authority to make it, that fact affords a good ground for reversing the decree; but not for restricting the right of appeal, to a shorter time than would have been allowed if the decree had not been erroneous upon the ground that it was unauthorized.

THIS was an application, on the part of the respondents, to dismiss an appeal from a decree of the surrogate of the county of Ulster, upon the ground that the appeal was not entered in time. The order appealed from was dated the 20th of January, 1846, and purported to be an order for a final settlement, and for the discharge of the respondents as executrix and executor, upon the payment of the sums specified in the decree. But the affidavits on the part of the respondents showed that the decree was not yet actually entered, as late as the 10th of March, 1846, nor did it appear when it really was entered.

M. T. Reynolds, for the appellants.

A. Taber, for the respondents.

THE CHANCELLOR. The transcript in this cause was not filed until after the notice of the motion to dismiss the appeal. And if the respondents had placed their application upon that ground alone, and not upon the supposed irregularity of the appeal itself, they would have been entitled to the costs of the motion; although the court in the exercise of its discretion, might have refused to dismiss the appeal.

So far as I can form an opinion, from the papers before me, this must be considered as an appeal from a decree for the final settlement of the accounts of the respondents, as the executor and executrix of I. De Witt, deceased. It is true, the affidavits on the part of the respondents, as well as the certificate of the

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surrogate, show that no regular proceedings were ever instituted for the *final* settlement of such accounts. And from the return I infer, too, that no regular proceedings were instituted for the settlement of their accounts in any way. The petition presented to the former surrogate, on the part of the appellants, was merely that the respondents might be required to *render* an account of the administration of the estate; but it did not ask for a *settlement* of the account, or for the payment of any balance which might be found due to the petitioners, or for any other relief whatever. And the decree appealed from states that such account was finally closed before the former surrogate, about the 28th of November, 1844. That, according to the decision of this court in *Westervelt v. Gregg*, (1 *Barb. Ch. Rep.* 470,) terminated the proceedings before the surrogate. And he had no authority or jurisdiction to proceed and *settle* the account, unless the respondents asked for a final settlement of their accounts, or some person, interested in the estate, applied for the payment of his debt or legacy, or distributive share; so as to render a settlement of the estate necessary, as between the parties, to enable the surrogate to grant the relief prayed for. No such application appears to have been made in this case, by either of the parties.

The present surrogate, however, as I infer from the papers, upon his own motion, and without any application by the respondents for the final settlement of their accounts, did make an order, in August, 1845, entitled "*In the matter of the accounting for and final settlement of the estate of Isaac De Witt deceased,*" and reciting that proceedings had been had for the *final* settlement of the accounts of the respondents, as the surviving executor and executrix of the will of the decedent; by which order their accounts, and the vouchers in support of them, with the proofs and admissions of the parties, were referred to an auditor to examine and report thereon. And upon the coming in of the report of the auditor, the decree appealed from was made; which is also entitled in the same manner. And it is in fact a decree which purports to be a final settlement of the accounts of the respondents, and discharges

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them from all further responsibility on account of the personal estate of the decedent, upon payment of the several sums, and to the persons, specified in that decree. The question, therefore, is not whether the decree was irregular, and wholly unauthorized, because the surrogate had no jurisdiction to make it; but whether it purports to be a decree for the final settlement of the accounts of the respondents. For, if it is in fact such a decree, the appellants had three months from the time it was recorded to appeal from it. And if the decree was erroneous because it was unauthorized, that would afford good grounds for reversing it; but not for restricting the right of appeal to a shorter time than would have been allowed if the decree had not been erroneous, upon the ground that it was wholly unauthorized.

Again; if this was a decree which the appellants were bound to appeal from within thirty days after it was made, there is nothing in the papers before me to show that the appeal was not brought within thirty days after the decree was drawn up and entered in the records of the surrogate. And the decree must be considered as made at that time, and not when the surrogate came to the conclusion as to what the decree should be. Here there is evidence that as late as about the tenth of March, 1846, the decree had not been entered. And there is nothing to show that it was not in fact entered within thirty days previous to the perfecting of the appeal.

The motion to dismiss the appeal is therefore denied: and neither party is to have costs as against the other upon this application.

DIDIER, survivor, &c. vs. DAVISON, survivor, &c.

[Approved, 10 How. 516, 526, 527.]

The exception in the statute of limitations of 1801, relative to actions which concern the trade of merchandise between merchant and merchant, their factors or servants, does not apply to a bill in chancery for an account and settlement, and for the payment of a balance due from one mercantile firm to another, by reason of joint adventures in which the two firms had been engaged; where all the items of the account, on both sides, were more than six years previous to the filing of the bill. In such a case the statute is a bar.

Where a right of action accrued previous to 1830, it is to be governed by the act of 1801 for the limitation of actions, and not by the new provisions of the revised statutes on the subject; although the defendant has promised to pay the debt whenever he should be able to do so, and the bill does not show such ability previous to 1830.

Where a debtor, who is absent from the state at the time the cause of action accrues against him, afterwards comes into this state, and is here publicly and openly, so that by reasonable diligence his creditor might have commenced a suit against him, it is a return into this state within the meaning of the fifth section of the act of 1801 for the limitation of actions.

But a mere clandestine return of the debtor, which will not enable the creditor, with ordinary diligence, to serve process upon him, is not such a return as will cause the statute of limitations of 1801 to commence running against the demand, so as to bar it in six years from such return to this state.

The open residence in this state, for three or four years, of one of two joint debtors who were absent at the time the cause of action accrued, and the subsequent residence in this state of the other joint debtor, is such a return of both debtors to this state as was contemplated by the statute; although in point of fact their creditors were not aware of the residence of either of such debtors in this state.

Under the act of 1801, if the debtor was in this state at the time the cause of action accrued against him, or came here subsequently, so that the statute once began to run against the demand, it continued to run, notwithstanding he departed from the state within the six years; and no subsequent disability would stop it.

Even the death of either of the parties, after the statute had once commenced running, would not prevent the limitation from attaching; except in cases which were provided for by some other statutory provision.

Under the provisions of the old statute of limitations, the return of one of two joint debtors into the state, after the right of action had accrued against both, and his subsequent death within the six years, will not bar the right of action against the survivor, who does not come into the state until within six years of the time when the suit is brought against him.

By the provisions of the revised statutes, where the right of action against a debtor accrued subsequent to the time when those statutes took effect, he must have continued to reside within this state for six years, to render the act of limitations a bar to the suit; and the time he has resided out of the state after the right of action accrued is not to be taken into the account, in the computation of the time within which the action must be commenced.

Didier v. Davison.

THIS was an appeal, from a decretal order of the assistant vice chancellor of the first circuit, allowing the defendant's plea to the bill filed in this cause.

In September, 1815, H. Didier, the complainant, and J. N. D'Arcy, since deceased, were copartners in business at the city of Baltimore, and the defendant J. Davison, and H. Hill, since deceased, were also copartners in trade residing out of the United States. This suit was commenced against Davison, who was temporarily in this state, in November, 1843, for an account and settlement, and for the payment of a balance due to the firm of Didier & D'Arcy, from Davison & Hill, by reason of certain joint adventures in which the two firms were engaged in 1815 and 1816. The bill alleged that the defendant Davison had resided out of the United States ever since the debt of his firm was contracted, and that at the time of the filing of the bill he resided at Cape Hayti; and that Hill, if living, was still a non-resident. The bill also stated, as a pretence of the defendant, that Hill came to the state of New-York to reside, in 1820, and resided there three or four years. But it charged that, if he did, the complainant and his deceased copartner were ignorant of it, and that Hill avoided them and gave them no opportunity to enforce their claim against him; that he was, at the time alleged or pretended as the period of his residence in this state, unable to pay the debt, or any considerable part of it, and had no property in this state belonging to him or his firm; and that he died at sea, and insolvent. The bill also stated, as a pretence of the defendant Davison, that he also came to New-York to reside in March, 1834, and continued to reside here until March, 1835, and that he again resided in this state from July, 1835, to September in the same year. But the bill charged that if such was the fact, the complainant and his partner were ignorant of it; and that he did not rent or purchase a store or dwelling house here, nor cease to transact business at his former place of trade out of the United States, nor did he afford the complainant any opportunity of enforcing or obtaining payment of his debt.

The defendant pleaded in bar to all the relief prayed for in

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the bill, and to all the discovery, except as to his continued residence out of the United States, and as to the charges in the bill relating to the character of the residences of himself and Hill in this state, if they ever came here, that the complainant's cause of action or suit accrued, or arose, more than six years before the filing of the bill in this cause and the suing out of process against the defendant thereon. The plea also denied the allegation of the defendant's continued residence out of the United States; and averred that he came to the state of New-York to reside, with his family, about the 7th of March, 1834, and continued actually and openly to reside here, and to transact mercantile business, until March, 1835; that he then left this state for a time and returned again in July, 1835, and continued to reside here openly until September in the same year. The plea also averred that Hill came to this state to reside in 1820, and continued to reside here openly for three or four years. The answer in support of the plea stated, among other things, that Hill died at sea in 1824 or 1825.

The assistant vice chancellor allowed the plea, and ordered the bill to be dismissed, unless issue was taken upon the plea within ten days. For a report of the case before the assistant vice chancellor, see 2 *Sand. Ch. Rep.* 61.

C. B. Moore & F. B. Cutting, for the appellant. The statute of limitations (1 *R. L.* of 1813, p. 184,) does not bar the claims mentioned in the bill; because, as to some of the items, they are demands arising out of partnership transactions, and are cognizable only in a court of equity. The action of account is the only remedy at law which could apply, and that action will not lie when the partnership consists of more than two persons. (*McMurray v. Rawson*, 3 *Hill*, 62, and cases there cited. *Beach v. Hotchkiss*, 2 *Conn. Rep.* 425.)

This is a suit which concerns the trade of merchandize between merchant and merchant, and is therefore within the exception of the statute. (1 *R. L.* of 1813, p. 186, § 5.) The authorities cited by the revisers, (3 *R. S.* 703,) do not warrant their conclusions. (*Coster v. Murray*, 5 *John. Ch. Rep.*

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522, 531. *Murray v. Coster*, 20 *John*. 576, 591, 603, 604. *Atwater v. Fowler*, 1 *Edw. Ch. Rep.* 425, 426.) The case of *Barber v. Barber*, (18 *Ves.* 286,) relied upon by the assistant vice chancellor, is disapproved of in *Robinson v. Alexander*, (8 *Bligh's Rep. N. S.* 352,) where there had been no dealings for fifteen years. See also *Lansdale v. Brashear*, (3 *Monroe*, 330;) *Patterson v. Brown*, (6 *Id.* 10, 11;) *Manderville v. Wilson*, (5 *Cranch*, 15; *McLellan v. Crofton*, (6 *Greenleaf*, 307;) in which last case the chief justice reviews most of the authorities. See also the opinion of Senator Viele, (20 *John*. 590.) The plea is double. It sets up two separate grounds of defence under the statute of limitations; one on the return of Hill in 1820; the other, by the return of Davison in 1834. They lead to two distinct and separate issues, and require different replies to each. (*Beames' Pleas*, 13, 37, 39.) The answer either overrules the plea, by attempting to answer points covered by the plea; or it is defective, and fails to support the plea, by not denying that Hill and Davison have avoided the complainant, &c. and by not answering, both as to him and Davison, all the circumstances necessary to shew a fair and sufficient return, as against the complainant, within the meaning of the statute. To *avoid*, means to shun, to endeavor to shun—to escape. To *shun*, means to endeavor to escape. (*Johnson and Walker's Dictionaries*.) The return of Hill, in 1820, was not sufficient to bar this suit against Davison, under the circumstances disclosed by the pleadings. Nor was the return of Davison, in 1834, sufficient to bar this suit. The circumstances do not shew that his return was so notorious and public as to amount in law to constructive notice, or to raise the presumption that if the complainants had used ordinary diligence Davison might have been arrested. (*Little v. Blunt*, 16 *Pick.* 359. *Ruggles v. Keeler*, 3 *John. Rep.* 261. *Fowler v. Hunt*, 10 *Id.* 464. *White v. Bailey*, 3 *Mass.* 271.) The old statute of limitations, (1 *R. L.* 1813, p. 186,) had not attached or commenced running, in favor of Davison, at the time of its expiration on the first of January, 1830. Davison never was in this state until 1834; at which time the statute of 1813 had expired. He never had any vest-

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ed rights under that statute. He was a resident of a foreign country until 1834, and the statute of this state, until he came within its jurisdiction, did not apply to him. The provision in the revised statutes, (2 R. S. 300, § 45,) was intended merely to save existing rights, and to prevent the new statute from having a retroactive operation. (*Revisers' Notes*, 3 R. S. 704.) The previous law not having attached in favor of Davison, before the revised statutes went into effect, his case is not within the spirit or intent of the 45th section; and was not contemplated as a case that needed to be excepted. And if the revised laws of 1813 had not begun to run when the revised statutes of 1830 went into effect, then his coming into this state, in 1834, does not bar this suit; because he left again in 1835, and did not return until 1844. (2 R. S. 297, § 27.) The right to plead the statute of limitations of 1813 never attached to Davison, because he never was a resident or citizen of this state, nor within its jurisdiction, until several years after its repeal. (*General repealing act*, § 5, 2 R. S. 779.)

If the complainant is barred in respect to his original demand, he may still have a right of action, upon the promise to pay when able; which right has accrued since 1830, and is to be governed by the revised statutes. (*Wait v. Morris*, 6 Wend. 395. *Waters v. Earl of Thanet*, 2 Adol. & Ellis' Rep. N. S. 757.) If the chancellor should dissent from these views and affirm the order of the court below, it should be without prejudice to the complainant's right to file a new bill, or to amend the present bill.

James Smith, for the respondent. The demand set forth in the bill of complaint, is one that may be barred by the statute of limitations. The statute commenced running when Hill came to the state of New-York to reside, in 1820; and the demand was outlawed in the year 1826, before the passage of the revised statutes. Even if the statute had not begun to run as to Davison, in consequence of his not having returned to the state in the year 1820, when his partner first came here to reside, still, it had in part operated upon the action in question, and the

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law as it existed before the revised statutes, and which had in part operated, must still be applied. The revised statutes do not interfere with the case, and consequently as Davison, himself, returned to the state in the year 1834, and continued to reside openly in the state, and to keep house therein for about one year, the statute at all events began to run as to him. And more than six years had expired, thereafter, before the commencement of this suit; so that in any event the demand is outlawed.

The bill having averred that the defendant had resided out of the United States of America ever since the debt had accrued, it became necessary to support the plea of the statute of limitations, by an answer denying that allegation, and making the discovery, in that respect, called for by the bill. And the plea is, under the circumstances of the case, entitled to the favorable consideration of the court. The demand is set forth in the bill as having arisen in the year 1816, about 28 years since. It is therefore a very stale demand, and this court should, either upon a plea of the statute of limitations, or upon an answer making the proper averment in that respect, presume a payment of the demand in question; and should refuse to entertain the bill.

THE CHANCELLOR. The first question for consideration in this case, is whether it is within the exception in the statute relative to actions which concern the trade of merchandize between merchant and merchant, their factors or servants. (1 R. L. of 1813, 186, § 5.) The recent decisions in England, and which appear to contain the most reasonable construction of this much contested exception, in the statutory provision, which was substantially the same in both countries, have placed it upon a ground which is capable of a rational application. In the case of *Inglis and another v. Haigh*, (8 Mees. & Wels. Rep. 769,) which came before the court of exchequer in 1841, it was held that the exception in the statute did not apply to an action of *indebitatus assumpsit*; but only to actions of account between merchant and merchant, their factors or ser-

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vants, concerning the trade of merchandize, or to actions on the case for neglecting or refusing to account in conformity to some express or implied duty to do so. And this decision of the court of exchequer was fully concurred in, the next year, by the judges of the court of common pleas, upon a full examination of the question, in the case of *Cottam v. Partridge*, (4 *Scott's Rep. N. S.* 819.) In the last case, it was also held that mutual dealings between merchants, where each was selling goods to the other, would not bring the case within the exception of the statute, unless there was some agreement, express or implied, that the sales on the one side should be set against those on the other, and the balance only be payable. In other words, the courts in England have settled the principle that the exception in the statute does not apply, although each merchant has items of account against the other, where the accounts are so separate and distinct that the parties may both bring actions of assumpsit, and recover the amount of their respective accounts, in case a set-off is not claimed by the adverse party; so that an action of account could not be brought by one against the other. It has also been recently settled in the house of lords, in England, that in a case between merchants, or between a merchant and his factor or servant, concerning the trade of merchandize, where an action of account could have been brought by the plaintiff at law, the right to file a bill in the court of chancery, for an account, is not barred by the statute of limitations; although there have been no dealings between the parties, nor any promise to account, for more than six years. (*Robinson v. Alexander*, (8 *Bligh's Rep. N. S.* 352.) And the case of *Barber v. Barber*, (18 *Ves. Rep.* 255,) decided by the master of the rolls in 1811, which was supposed to establish a contrary doctrine, was overruled. Or rather the report of that case was discredited; the lord chancellor, for the reasons stated in his opinion, supposing that the reporter had been misinformed, and that no such decision had ever been made by the distinguished judge who held the office of master of the rolls when the case of *Barber v. Barber* was supposed to have been decided.

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But in a case in this state, *Costar v. Murray*, (5 *John. Ch. Rep.* 523,) my very able and learned predecessor, who has so recently closed his long life of uninterrupted public usefulness, (a) and has descended to the grave in the blessed assurance of the christian's hope, without a spot or a blemish upon the bright escutcheon of his fame, took a different view of this question. He, in effect, decided, although it was not necessary to the determination of the case before him, that where all the items of the account, on both sides, were more than six years before the commencement of the suit, the exception in the statute does not apply. And when that case came before the court for the correction of errors, (20 *John. Rep.* 583, *S. C.*) his equally distinguished legal brother, the then chief justice of the state, who still lingers among us, a specimen of the giant intellect of the past generation, expressed a clear and decided opinion that the exception in the statute did not apply to a case where the items of the account were all on one side. The supreme court also had previously decided that the exception was not applicable to the case of a settled or stated account. (*Ramchander v. Hammond*, 2 *John. Rep.* 200.) And the revisers, in their note to the new provision which they introduced into the revised statutes on this subject, consider it as the settled law here, that when all accounts have ceased for six years, the statute is a bar. (2 *R. S.* 2d ed. 703.) Whatever my own opinion might have been, upon the question under consideration, if it were now presented for the first time for decision here, I do not feel authorized to disturb what must be considered as the settled law in this state. It is not necessary, therefore, to examine the question whether an action of account could have been brought, at law, against Davison and Hill, for any part of the claim of Didier & D'Arcy, for the recovery of which this bill is filed.

The right of action in this case accrued previous to the first of January, 1830, and must be governed by the provisions of the act of April, 1801, for the limitations of actions. (1 *R. L. of 1813*, p. 184;) and not by the new provisions of the revised

(a) See a brief sketch of the life of Chancellor Kent, and a notice of the proceedings had, upon the occasion of his death, in the Appendix to this volume.

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statutes on the subject. (2 R. S. 300, § 45. For although it is alleged in the complainant's bill that the defendant Davison promised, in his letter of 1817, to pay the debt whenever he should be able to do so, and the bill does not show such ability previous to 1830, the statute of limitations had not run upon the demand at the time of making that promise; and there was no agreement, on the part of Didier & D'Arcy, to suspend the enforcement of their demand until the defendant should be able to pay it. The right of the complainant to recover in this suit, therefore, depends upon the original liability of the defendant, and not upon the subsequent promise to pay when he should be able.

The next objection to the defendant's plea is that it is double. The form of this plea is, "that the cause of action or suit did not accrue or arise within six years previous to the filing of the bill." And the averments in relation to the residences of the defendant and of Hill, in this state, are merely inserted therein to meet the suggestions, in the bill, which were intended to bring the case within the exceptions of the statute. And if some of those averments are not mere surplusage, they all tend to establish the single point of the plea, that the right of suit accrued more than six years previous to the filing of the complainant's bill; and that the suggestions of the bill which were intended to bring the case within the exception of the statute of limitations are not true. I shall therefore proceed to consider the more important question, to the parties in this cause, whether either of the averments in the plea relative to the residences of Hill and of Davison, in this state, brings the case within the exception contained in the last clause of the fifth section of the act of April, 1801.

That section provides, that "if any person against whom any cause of any such action shall accrue, shall be out of this state at the time the same shall accrue, the person who shall be entitled to such action shall be at liberty to bring the same within the times respectively above limited, after the return of the person so absent into this state." Under this provision of the statute it has been held that if the person against whom the right of action accrued had never been in the state, before such right of action

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accrued, the suit might be brought against him at any time within six years after he first came into the state; although more than six years had elapsed before he came here. (*Ruggles v. Keeler*, 3 *John. Rep.* 263.) And where the debtor comes into this state, after the right of action has accrued, and is here publicly and openly, so that by reasonable diligence his creditor might have commenced a suit against him before his departure from the state, it is a return into this state, within the meaning of the statute. (*Fowler v. Hunt*, 10 *John. Rep.* 464.) But a mere clandestine return, which will not enable the creditor, with ordinary diligence, to serve process upon him, is not such a return as will cause the statute of limitations to commence running against the demand; so as to bar it in six years from that time. (*White v. Bailey*, 3 *Mass. Rep.* 271.) It has also been held, under a similar provision in the statute of a sister state, that where the defendant, who did not reside in the state, was in the habit of making temporary visits there for a few days, once or twice a year, but without the knowledge of the creditor, who had persons watching to have him arrested if they could find him in the state, it was not a return to such state, within the meaning of the statute. (*Little v. Blunt*, 16 *Pick. Rep.* 359.) In the case under consideration, however, the open residence of Hill in the state for three or four years, from 1820 to 1824, and of Davison for one entire year, from March, 1834, was such a return of both these parties, to the state, as was contemplated by the framers of this statutory provision; although, in point of fact, Didier & D'Arcy, who resided in Baltimore, were not aware of the residence of either of their debtors in this state.

It has been repeatedly settled, under this statutory provision, that if the debtor is in this state at the time the action accrues against him, or comes here subsequently, so that the statute once begins to run against the demand, it continues to run notwithstanding he departs from the state within the six years; and that no subsequent disability stops it. Even the death of either of the parties, after the statute has once commenced running will not prevent the limitation from attaching; except in cases which are provided for by some other statutory provision

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There was, I believe, no provision in any of the statutes of this state, at the time of the death of Hill in 1825, by which the statute of limitations would be suspended by his death, if it had commenced running previous to that time ; although he died out of the state, within the six years, and insolvent. The question then arises whether the return of one of two joint debtors, into the state, after the right of action has accrued against both, and his subsequent death, is a bar to a suit against the survivor ; who does not come into the state until within six years of the time when the suit is brought against him.

Upon the argument of this appeal I entertained a very strong and decided opinion that the return of Hill to this state, in 1820, would not have the effect to bar the right of action here against the defendant Davison. It is true, under the statute of James, in reference to disabilities of the parties who are to bring the suit by reason of non-residence, which provision was not incorporated into the statute of this state, it has been held, in England, that the exception in favor of non-resident plaintiffs did not apply where some of them were not beyond seas. For the absence of the other was no excuse for the failure to bring the suit, by those who were within the realm, they being competent to institute the suit for themselves and the absentee, who together were joint owners of the debt for which an action was to be brought. (*Parry v. Jackson*, 4 T. R. 515.) But in the case under consideration it would have been perfectly useless to institute a suit against Hill, who had no property, either of his own or of the firm of which he was formerly a member. And the reasons upon which the exception in our own statute is founded do not apply to such a case. I am therefore pleased to find that a recent decision of the court of queen's bench in England, made since the argument of this cause, confirms the strong impression which I then entertained as to the law on this point. In *Fannin v. Anderson*, (9 Lond. Jur. Rep. 969,) this question came before that court for decision, under a similar provision in the statute of Anne. And after a full argument, and taking time for consideration, the court decided that where one of the joint debtors was out of the realm when the

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cause of action accrued, although the others were within the jurisdiction of the court at that time, he could not set up the statute of limitations as a bar; where the suit was commenced within six years after his return from abroad. And such I have no doubt is the reasonable and proper construction of our statute on that subject.

The residence of Hill in this state from 1820, and the neglect to institute a suit against him, not being sufficient to take the case out of the exception in the statute, as to the defendant Davison, it remains to be considered whether the residence of the latter in this state, in 1834 and 1835, and the neglect to institute a suit for more than six years after he came here to reside, is a bar to the present suit. If this case depended upon the provisions of the revised statutes alone, it is evident that the suit would not be barred. As he left the state before the expiration of the six years, and only returned again a few days previous to the service of the process upon him in this suit, the 27th section of the title of the revised statutes relative to the time of commencing actions, (2 R. S. 297,) would prevent a residence here for less than six years from operating as a bar. For, by the provisions of that section, the time the debtor has resided out of the state after the cause of action accrued, is not to be taken into the account in the computation of the time within which a suit must be brought against him. But none of the provisions of the first four articles, of the title of the revised statutes before referred to, apply to cases where the right of action accrued previous to the first of January, 1830; although the person against whom the suit was to be instituted was not a resident of the state, so as to be liable to be sued here, until after the revised statutes went into operation. On the contrary, the limitation of the right to institute a suit against him, after he came into this state, depended entirely upon the laws which were in force previous to 1830. (2 R. S. 300, § 45.) The statute of limitations, therefore, commenced running immediately after the defendant Davison came here to reside, in March, 1834; and it continued to run, notwithstanding his subsequent absence from the state. For there is nothing to

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take the case out of the general rule, which existed and still continues to exist, in reference to cases coming under the act of limitations of April, 1801, that where the statute once commences running it continues to run notwithstanding any subsequent absence or disability. (*Doe v. Jones*, 4 T. R. 300. *Peck v. Randall*, 1 John. Rep. 165.) The remedy at law being barred by the statute, which is applicable to the case, the suit in this court also must be considered as barred thereby.

The decretal order appealed from must therefore be affirmed, with costs.

KYLE vs. THE AUBURN AND ROCHESTER RAIL-ROAD
COMPANY.

The statute incorporating the Auburn and Rochester Rail-Road Company vests the title and possession of the land, taken for the purposes of the rail-road, in the corporation. And the owner of the adjacent land has no right to pass over the land thus taken, and cannot cross the rail-road, without being a trespasser; except by virtue of the 10th section of the act of 1838.

The corporation, under that section of the statute, is bound to permit the owner of the adjacent land to cross the rail-road at convenient and necessary crossing places. But it is not bound to construct viaducts or embankments for that purpose, except such as were designated upon the profile and map of the road, referred to in the third section of the act of April, 1838.

Where the map, plan, and profile, required by the statute to be annexed to the petition of a rail-road company praying for the appointment of a jury of appraisers, show that the road is to be constructed with a viaduct at a particular point, for the convenient passage of the owner of lands which are severed by the construction of the rail-road, or with a bridge to be erected over such road for the same purpose, the jury should assess the damages with reference to such plan of construction. And if the corporation afterwards attempts to deprive the land owner of the benefit of such contemplated viaduct, or other artificial crossing place, the court of chancery will interfere for his relief; in case he has no sufficient remedy at law.

The court, in such a case, would consider the map, plan, and profile, a part of the petition presented by the rail-road company. And the rights of the parties would be the same as if the corporation had been authorized to take the land, for the purpose of constructing a rail-road upon that particular plan; and as if the statute

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had directed the jury to estimate the damage, to the land owner, in reference to a rail-road constructed in that manner.

Where the plan and profile of a rail-road, annexed to the petition praying for the appointment of a jury of appraisers, do not show that the road is to be constructed with a viaduct, for the passage of the land owner whose land is severed by the road, from his lands on one side of the track to those lying on the other: nor that it is a part of the plan that the road, generally, is to be constructed with viaducts, bridges, and side embankments, for the purpose of enabling the owners of lands which shall be severed by the rail-road to pass conveniently from one side of the road to the other, the jury, in making their assessment of the damages—when there has been no valid and binding agreement between the corporation and the land owners upon the subject—should proceed upon the ground that where any viaducts, bridges, or other artificial facilities will be necessary, for the convenient crossing of the rail-road, the land owners themselves will have to be at the expense of erecting them. And in the absence of any proof to the contrary, a jury of appraisers will be presumed to have acted upon that principle in assessing damages.

THIS case came before the chancellor upon a demurrer to the complainant's bill. The complainant was the owner of a farm in the county of Cayuga, through which the Auburn and Rochester Rail-Road Company located their rail-road. The line of the road was so located as to leave about twelve acres of the farm to the south of that line; and upon that twelve acres there was a spring of water, at which the complainant had been in the habit of watering his cattle, &c. kept upon other parts of the farm, and at his barn which was north of the rail-road. The corporation not being able to agree with the complainant for the purchase of the land necessary for the purposes of the rail-road, the value of the land, and the damages which the complainant would sustain by the taking of his land, and in the construction of the road, were assessed by a jury; under the provisions of the act of 1836, incorporating the company, and of the act of 1838, amending the same. And the company paid the amount of the assessment, and became seised and possessed of the land mentioned in the certificate of the jury, according to the provisions of those acts. The agents of the corporation thereupon proceeded to construct the rail-road across the farm of the complainant, raising the embankment twelve or fourteen feet high opposite to the complainant's spring, and running off grad-

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ually to about the natural level of the surface of the earth where the line of the rail-way left the complainant's farm. The complainant thereupon filed his bill in this cause, stating these facts, and also that it was suitable, convenient, and necessary for his farming purposes, that the rail-road should be so constructed as to allow him a free passage, under the same, at a point opposite the spring. He also charged in his bill, that upon the assessment of the damages by the jury for the lands taken, the counsel, agents, and engineers of the company *contended* before the jury that the company, by the provisions of its charter, was legally bound to construct and maintain suitable and convenient crossing places, over or under their road, as circumstances might require, for farming and other necessary purposes; and, whether legally bound or not, that the company would in fact do so; and that, so far as the complainant was concerned, the company would make a crossing place for him under the said road, at or near a point opposite the spring, suitable and convenient for farming purposes. The bill also charged, on the information and belief of the complainant, that the jury believed the representations thus made, and assessed the damages at a sum exceeding one hundred dollars less than they would otherwise have done. The complainant also insisted, in his bill, that the corporation was legally bound to construct a convenient crossing place for him under their road, opposite the spring, independent of any declarations of intention to do so, made to the jury. But the agents and engineers of the corporation, although repeatedly requested to do so, were not constructing their rail-road with such a crossing place under it. The complainant therefore prayed that the corporation might be perpetually enjoined from constructing its rail-road without such crossing place, or that he might have such other relief as should be equitable and just.

A. *Worden*, for the defendants. The prayer of the bill is that the defendants may be restrained from so constructing the track of their road, across the complainant's farm, as to prevent him from having and enjoying at all times a suitable and con-

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venient crossing place under said road, and for general relief. The application for an injunction having been denied, and the rail-road being actually constructed, the injunction prayed for would be inoperative. The complainant, under the prayer for general relief, may have such a decree as the equity of the case warrants.

It is submitted that the facts set forth in the bill afford no grounds for the intervention of this court. As long as the award of the jury of appraisers stands, it must have all the effect given to it by the statute. If that award was made upon any suggestion of counsel, as stated in the bill, or if it varied from what it would have been had such suggestions not been made, it may perhaps be set aside, but the court cannot interfere to remedy any thing done amiss by the jury of appraisers. They were acting under the provisions of the charter, in assessing the value of the complainant's land to be taken, and his damages to arise from the construction of the road. If they assessed the damage upon any other principle, they have been unmindful of their duty, and it is not perceived on what principle this court can interfere to correct errors of the jury. The company, under the award, have acquired all the rights secured and resulting from it, by the provisions of the charter. (*Laws of 1838, p. 283, § 9.*) If the representations of the counsel and agents of the company, as stated in the bill, amount to any thing, they create a contract for which the complainant has his remedy in a court of law. But they do not amount to a contract, and are not binding on the company; as there is no authority from the company shown authorizing any such statements.

The bill seems framed upon the idea that the company are to construct their road with viaducts, if the convenience of the owners of adjoining lands would be promoted thereby. By vesting the fee of the land in the company, all right of entry is taken away from the owners of adjacent lands: they would have no right to cross over or under the road. To give a right of this nature, the tenth section of the act last cited, confers upon individuals through whose land the road passes, the right of passing over the road at *suitable* and convenient places for

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farming purposes. This right belongs to the complainant, and he has not been disturbed in it. No grounds are perceived on which the bill can be sustained, and the demurrer, it is submitted, is well taken.

W. T. Worden, for the complainant. The defendants hold solely under the statute creating the corporation. The act of incorporation being an abridgment of the rights of others, should be construed strictly as against the corporation. A power derogatory to private property must be construed strictly and not enlarged by intendment. (*Lofft*, 438.) Acts of parliament, conferring new and extraordinary powers of a special nature upon particular persons, affecting the property of individuals, or giving exemption from a general burden, attaching by law upon all parties, should receive a strict interpretation. (*Rex v. Croker*, *Cowp.* 25.) Where particular powers are granted to a company, if they enter upon any man's land, they must clearly show their authority; and if the words of the statute on which they rely are ambiguous, every presumption is to be made against the company, and in favor of private property. (*Scale v. Pickering*, 4 *Bing.* 450. See also *Dwarris on Statutes*, 750.) If the complainant had no rights prior to the act of April, 1838, (*Laws of 1838*, p. 87,) the 10th section of the act would confer upon him the right to cross the road at suitable and convenient places for farming and other necessary purposes. And by virtue of that section he would have a right to cross either over or under the road, as might be suitable and convenient; and the defendants would have no authority to prevent him from exercising that right. So far as the complainant is concerned, the 10th section is remedial. It was intended to remedy any inconvenience or injury which the general statute might occasion the owners of land taken for the construction of the road. As a general rule, a remedial statute ought to be construed liberally, giving it an equitable or rather a benignant interpretation. The letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said the construction made is contrary to the

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letter. (*Duarris on Stat.* 718.) Thus it is laid down, that a statute may be extended by construction to other cases, within the same mischief and occasion of the act, though not expressly within the words. (*Idem.*)

The legislature did not intend to compel the owners of land always to pass over the top of the road. This would be unreasonable, in some instances impossible. Whenever it is more reasonable and proper that the company should so construct their road, as to allow the land owner a passway under it, than to compel the owner to pass up over the embankment, they should do so. And where it is more reasonable and proper that the land owner should pass up over the embankment, than to compel the company to build a passway, the land owner ought to cross over.

The 10th section of the act of 1838 secures to the land owner, in express terms, the right to pass under the road. It provides that the rights and interest acquired by the corporation, shall not be deemed to prevent any individual through whose lands the said rail-road may run, or the grantees of such owner, from passing over the lands so taken, or the road constructed thereon. The statute is in the alternative. He may pass over the land so taken, or the road constructed thereon. The statute then in express terms secures to the land owner the right to pass over the land taken, under the rail-road; or he may pass over the road constructed thereon.

In construing a statute regard ought to be paid to the construction put upon similar statutes in force at the time when the one in question was passed. It is a maxim that *contemporanea expositio est*. So in this case, all the rail-roads constructed, and in progress of construction, when the act under which the defendants hold were passed, were so constructed as to allow passways under or over the line of the road, as the facts and the necessities of each case might warrant. The legislature did not intend to divide a man's farm by a rail-road a hundred feet high, and not allow him to pass under the line of the road, from one portion of his farm to the other. Nor can any such construction be put upon the statute without doing

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violence to the English language, and to the rights of private property. The defendants are bound by what took place before the jury of appraisers. It was an agreement; and the fact that the jury assessed a less sum to the complainant in consequence thereof than they otherwise would have done, is a sufficient consideration to support it; and the defendants are estopped from giving the statute any other construction. As was said in *Kendall v. Butler*, (10 *Wend.* 119,) they chose to make a law of their own, for the assessment of damages, and they must abide by it. If the defendants are not bound by what took place before the jury, they practiced a fraud upon the jury, to the injury of the complainant; from which fraud this court ought to relieve him.

A. Worden, in reply. The counsel for the complainant contends that a viaduct being convenient for his accommodation, the defendants are bound to construct it, upon general principles and on grounds entirely distinct from any thing which took place before the jury.

The whole of the complainant's bill must be taken together. If that showed a case of irreparable injury to the complainant, unless the viaduct was made, there would be some reason for the application of the general principles cited and referred to by his counsel. But the bill shows no such case. However convenient it may be for the complainant to have this viaduct constructed, it is not shown that by not constructing it irreparable injury would ensue. The company proposes to make the road without a viaduct. Viaducts are no part of the road. They are not necessary for its construction; and the damage the complainant is entitled to, and which the jury were bound to assess; are such as would result from the construction of the road in the ordinary way, and as the company is authorized to construct it. The statute does not contemplate that the jury in making their estimate of damages, should take into consideration any particular mode of construction whereby the damage would be less than would result from another mode. If this was to be considered by the jury, the statute should have

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required them to specify, in the award, the mode of construction in reference to which their estimates were made.

The complainant does not pretend that the defendants are constructing their road in an unusual manner, and by that means working him an injury; but he alleges it was understood by the jury that the company would construct this viaduct, and that the damages were assessed on the supposition that it would be built. The whole of the allegations on this subject in the bill are that the company, by their counsel, agents and engineers, contended before the jury that the company were bound to make crossing places over and under their road, and that whether bound or not, they would do so; and that, as far as the complainant was concerned, the company would make a crossing place under the road, on the complainant's farm at or near the point designated. And the complainant charges, on his information and belief, that the jury believed the representations so made, and therefore assessed the damages at more than a hundred dollars less than they otherwise would have done. There is no allegation that the complainant assented that the jury should take into consideration the declarations of the agents and counsel of the company, nor is there any thing which amounts to an agreement between the complainant and the company that the company should build this viaduct. If the complainant had set forth an agreement between himself and the company that this viaduct should be built, and assented that the jury should assess the damages in reference to such an agreement, he might have a remedy. But it does not appear that he ever assented on his part that the jury should take into consideration those declarations of the agents and counsel: and this court will not assume that under these vague statements, not concurred in or assented to by the complainant, or amounting to a contract as between him and the company, the jury have proceeded upon any other principle in estimating the damages than that which by their oaths and the statute they were bound to adopt.

If there was an agreement between the company and the complainant that the company should construct the viaduct.

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the complainant has his remedy on such contract in a court of law. But this court will perceive no such contract is set out in the bill, and therefore that no relief can be predicated on such a contract. If by any fraud the damages were assessed at less than they would have been, such fraud should have been distinctly set forth and charged in the bill, so that an issue could be taken upon it. It is not even averred that the statements were made by the counsel and engineers, with a view or intent of deceiving or misleading the jury. And before this court interferes on the ground of fraud, it must be made clearly to appear that a fraud was not only practiced but intended.

THE CHANCELLOR. The counsel for the complainant is clearly wrong in supposing that the corporation, by the provisions of its charter, is bound to construct a viaduct for the complainant, under the track of the rail-road, at the point designated in his bill, or at any other point. The statute having vested the title and possession of the land, taken for the purposes of the rail-road, in the corporation, the tenth section of the act of 1838 was necessary to give to the owner of the adjacent lands the right to pass over the land thus taken, and to cross the rail-road, without being a trespasser. The corporation, therefore, is bound to permit the owners of the adjacent lands to cross the rail-road at convenient and necessary crossing places. But it is not bound to construct viaducts or embankments for that purpose, except such as were designated upon the profile and map of the road, referred to in the third section of the act of April, 1838. (*Laws of 1838, p. 283.*) That section provides that upon the application to the judge to appoint the jury of appraisers, the corporation shall annex to its petition *a map, plan, and profile of the road*. The object of requiring this map, plan, and profile of the road was, undoubtedly, to apprise the owners of the lands to be assessed of the manner in which the road was intended to be constructed, in reference to the height of its embankments, or the depth of its excavations, and in reference to culverts, viaducts, &c. as well as to the courses of the track; to enable the jury properly to estimate the damage

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which would probably be done to the owner of the land taken, for the construction of the road in the manner contemplated by such plan, or profile, as well as the value of the land itself. And if such plan and profile, annexed to the petition of the corporation, showed that the road was to be constructed with a viaduct, at a particular point, for the convenient passage of the owner of the lands which should be severed by the construction of the rail-road, or with a bridge to be erected over such road for the same purpose, it would be proper for the jury to assess the damages with reference to such plan of construction. In the case supposed, if the corporation afterwards attempted to deprive the land owner of the benefit of the contemplated viaduct, or other artificial crossing place, it would be the duty of this court to interfere for his relief, in case he had no sufficient remedy at law. The court, in a case of that description, would consider the map, plan, and profile, a part of the petition. And the rights of the parties would be the same as if the petitioners had prayed for an assessment of the damages, and that the title to the land might be vested in the corporation for the purpose of making a rail-road thereon, upon the plan thereto annexed, and with the accommodations for crossing the same, by the owner of the lands taken, as specified in that plan. In other words, their rights would be the same as if the rail-road company had been authorized to take the land for the purpose of constructing a rail-road upon that particular plan, and as if the statute had directed the jury to estimate the damage to the landowner in reference to a rail-road constructed in that manner. But if the jury were not called upon and required to assess the damages in reference to such a plan of construction, the fact that the applicants for the rail-road had represented to the legislature that they intended to construct the rail-road in a particular manner, not specified in or referred to by the subsequent act of incorporation, would not entitle the owner of the lands, severed by the rail-road, to insist that such a crossing place should be constructed for him, by the company. (*North British Railway v. Tod*, 4 Rail. Cas. 449.)

In the case under consideration, it is not alleged that the plan

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and profile of the rail-road, annexed to the petition, showed that the road was to be constructed with a viaduct for the passage of the complainant, from his barn and lots on the north side of the track, to his spring on the south side thereof; or that it appeared, by the map and profile and plan of the road, to be a part of the plan that the road, generally, was to be constructed with viaducts, bridges, and side embankments, for the purpose of enabling the owners of lands which should be severed by the rail-road to pass conveniently from one side of the road to the other. The jury, therefore, in the assessment of the damages, where there was no valid and binding agreement between the corporation and the landowners, should have proceeded upon the ground that where any viaducts, bridges, or other artificial facilities would be necessary for the convenient crossing of the rail-road, the land owners themselves would have to be at the expense of erecting them, or must submit to the inconvenience of crossing the rail-road at some other place, where the grade of the road would enable them to do so. The jury, in the present case, must legally be presumed to have acted upon that principle, in assessing the plaintiff's damages. Although it is alleged that the counsel and agents of the corporation contended before the jury that the company was bound to make proper crossing places, to induce the jury to give a less amount of damages than was claimed by the complainant, the reasonable presumption is that his counsel insisted the law was otherwise; to induce the jury to enhance the damages, for the injury which the complainant would sustain by the taking of his land, and the construction of the road. The presumption therefore is, that the jury assessed the damages according to the legal rights of the parties. And the jurors cannot be received to impeach their assessment, by showing that they mistook either the law or the facts of the case. Nor can this court grant relief, to either of the parties to the assessment, upon that ground.

The bill also states that the counsel and agent for the corporation *contended* before the jury, that a viaduct would be made for the complainant's accommodation, whether the company was legally bound to make it or not. But I do not understand the

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complainant as intending to allege that any *agreement* was made with him that such a crossing place should be constructed for his accommodation ; or that he or his counsel consented that the jury should assess his damages upon any such principle. And if such an agreement was made, the proper remedy of the complainant, for the breach of the agreement, was by an action at law ; in which he would recover the full compensation that the jury ought to have awarded him if no such agreement had been made. This may be a hard case for the complainant, and the jury who assessed the damages may, from their ignorance of their duty, have done him injustice. But I do not find any allegation in the bill that the damages assessed to him were not in fact the full value of the land taken, and a fair and adequate compensation for all the injury he has sustained, or will sustain, by the making of the rail-road through his farm in the manner specified in the map, plan and profile annexed to the petition, presented to the judge under whose superintendence the jury was drawn and empannelled.

The demurrer, therefore, must be allowed. And the bill must be dismissed with costs, but without prejudice to the complainant's rights, if he has any, at law.

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Where a contract was made between the complainant and the defendant, under seal, by which the latter agreed to separate iron ore for the former at a specified price per ton, and the complainant stated, in his bill, that at the time of making such contract he was not aware of the existence of the provision of the revised statutes declaring that twenty hundred pounds avoirdupois shall constitute a ton ; and that it was the uniform practice and usage, in the vicinity of the parties, to estimate iron ore by gross weight, at the rate of 2240 pounds to the ton, which usage was known to, and acted upon by, the parties ; and that it was understood and intended by both parties that the ore should be accounted for at such gross weight ; and the bill prayed for a perpetual injunction against a suit at law, brought by the defendant to recover of the complainant compensation for separating the ore at the rate of 2000 pounds to the ton, and also prayed that the contract might be re

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formed, so as to correspond with the usage and the understanding of the parties; *Held* that the court of chancery could not make a decree, reforming the contract, founded upon the complainant's alleged ignorance of the existence of the statute, fixing the number of pounds necessary to constitute a ton, where the answer of the defendant denied any knowledge of the alleged ignorance on the part of the complainant, and positively denied the existence of the alleged custom, or that the defendant intended to contract to separate the ore in any other way than at the legal rate of 2000 pounds to the ton.

Courts will sometimes grant relief against a *mistake* of the law, where it can be done without impairing the rights of those who were ignorant of the existence of any such mistake, when their rights accrued.

Distinction between *ignorance* of the law, and a *mistake* of law.

Where a party has made a contract with another to separate ore for him, at a specified price per ton, and has carried such contract partially into effect, by separating ore under it for several months, without any knowledge of the alleged ignorance of the other party that 2000 pounds was a ton, instead of 2240 pounds, as he supposed, the court of chancery cannot reform the contract, so as to require such party to separate ore at the stipulated rate for each gross ton, without making an entirely new contract for him.

The case of *Many v. The Beekman Iron Company*, (9 *Paige's Rep.* 188,) explained, and limited.

THIS was an application, upon bill and answer, for the dissolution of an injunction. The bill stated that in October, 1843 a written contract, under seal, was made between the complainant and the defendant, at the town of Moriah in the county of Essex, whereby Hall, the complainant, was to furnish to Reed the defendant, a machine for separating ore, on a lot in Moriah specified in the agreement, and was to deliver ore at the machine sufficient to keep it in operation, and to furnish for one year suitable wood, at seven shillings a cord, to burn the ore. Reed agreed to separate the ore for Hall at seven shillings a ton; which last mentioned compensation Hall was to pay in money, provisions, iron, &c., in the proportions mentioned in the contract, as Reed might need it; and the parties were to settle every three months during the running of the contract, and if there was a balance found due to Reed at the time of any such quarterly settlement, Hall was to pay the same in the manner mentioned in the contract. Reed was also to have the use of a house and barn on the lot; and the contract also contained other stipulations between the parties, as to the furnishing cer-

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tain tools, for the purpose of separating such ore, and the expenses of keeping them in repair, &c. The bill further stated that, at the time of making such contract between the parties, the complainant was not aware of the existence of the provision of the revised statutes declaring that twenty hundred pounds avoirdupois shall constitute a ton; that prior to, and at the time of, making the contract, it had been, and then was, the uniform and invariable practice and usage of all dealers in iron ore, and of all persons following the business of digging, separating, or selling iron ore, at the place mentioned in the contract, and at all other places in that county and the adjoining county of Clinton, where the iron mining business was carried on, to estimate iron ore by gross weight, at the rate of 2240 pounds to the ton; that at the time the contract was made between the parties, it was understood and intended by both of them that the ore to be separated by Reed should be accounted for at such gross weight, estimating the ton according to the uniform and well established usage aforesaid; which usage was well known to both of the contracting parties, and that they intended to adopt it in their said agreement. The complainant also alleged that, at the end of the first quarter, the parties settled their accounts under the contract upon that principle, without any objection on the part of the defendant; when a considerable balance was found in favor of the complainant; that at the end of the second quarter Reed refused to settle upon that principle, and insisted upon being paid for separating the ore at the rate of 2000 pounds to the ton; and that the complainant having refused to pay him at that rate, the defendant had brought an action at law against him, for an alleged breach of the contract, although the defendant had been overpaid, if the ore separated should be estimated at the rate of 2240 pounds to the ton. The complainant therefore prayed for a perpetual injunction, restraining the defendant from proceeding at law for the alleged breach of the contract, and that such contract might be reformed, so as to correspond with the understanding of the parties and the usages of persons engaged in that business.

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The defendant, by his answer, denied the existence of the alleged custom or usage of persons dealing in iron ore, as well as that at the time of making the contract, stated in the bill, he understood, or intended, or in any way agreed, that the ore mentioned in the contract, and which was to be separated by him, was to be separated at gross weight, or that it was understood, intended, or agreed, or supposed by him that such ore was to be estimated in any other way than at the legal rate of 2000 pounds to the ton. He also denied that, at the time the contract was made, he either supposed or believed, or had any reason to believe, that the complainant thought he was contracting for the separation of ore by the gross ton; but, on the contrary, the defendant stated in such answer, that he then and still believed that at the time of making the contract, the complainant Hall well knew that by the laws of this state a ton was but 2000 pounds. And he further denied that he ever settled with the complainant upon the principle of estimating the ore, separated in pursuance of the contract, at the gross ton; or that any settlement whatever had been made between the parties, at the end of the first quarter, or at any other time; or that he had at any time or in any manner assented or agreed, either expressly or impliedly, that the ore raised or to be raised by him, under the contract, should be estimated at the gross rate of 2240 pounds to the ton.

N. Hall, Jun. for the complainant.

A C. Hand, for the defendant.

THE CHANCELLOR. There is no foundation for the objection that the matter in controversy does not exceed \$100. There is nothing to show how much ore has been separated already, or how much could have been separated within the three years; so as to fix the amount in controversy between the parties. The injunction was dissolved, upon the argument of this motion, so far as to permit the defendant Reed to proceed to judgment in the action which he had already brought.

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against the complainant, for the alleged breach of the contract between the parties ; and also so far as to allow him to bring any new suits at law for subsequent breaches, and to proceed to judgment in such suits. This is not the proper place, therefore, to give a construction to the contract itself, in reference to the existence of the alleged custom or usage of persons engaged in the raising, separating, and selling iron ore, in the section of the state where this contract was made and where it was to be performed. If the existence of such a custom would control the language of the contract, so as to make the word tons therein mean gross tons of 2240 pounds, the remedy of the complainant was and is to prove the fact of such usage or custom, in the suit which has been commenced against him at law ; and in any suits which may hereafter be commenced against him there, for the alleged breaches of the contract by him. The only proper questions for consideration here are whether the alleged usage is sufficiently denied by the answer ; and if not, whether there is any thing in the other matters stated in the bill which affords a sufficient ground for the interference of this court.

The decision in the case of *Many v. The Beekman Iron Company*, (9 *Paige's Rep.* 188,) did not proceed upon the ground that it was competent for the court of chancery to make a contract for the parties which they had not intended to make for themselves. But the decision of this court, in that case, was based upon the fact that both parties had really agreed and intended to contract for the sale and purchase of the iron at the rate of 2240 pounds to the ton, and not for iron to be delivered and paid for as statute tons. And that in reducing their verbal understanding and agreement to writing, the parties by mistake neglected to insert, in the written contract, the proper words to effectuate their agreement and understanding. In that case also, the defendants, by demurring, admitted the alleged understanding and agreement of the parties, as stated in the bill ; and the existence of the particular facts which were relied on by the complainant as evidence of the actual understanding and intention of the parties, which by mistake they had neglected to put in writing in the proper language to express that intention.

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In the case under consideration, however, the defendant absolutely denies any intention on his part to contract for the separating of ore other than by statute tons ; and he denies the allegations in the bill which are relied upon to show that he in fact thought he had contracted to separate the ore at the rate of seven shillings for each ton at gross weight.

It is impossible for this court to make any decree, reforming this contract, founded upon the complainant's alleged ignorance of the existence of the statute fixing the number of pounds which were to constitute a ton. The allegation of ignorance is put in issue by the answer. And I do not know any means of proving his ignorance of the existence of a statutory provision, which the law presumes every citizen of the state to be acquainted with who has arrived at years of discretion. I can imagine a case in which a party holding the affirmative of the fact, may give such evidence as will satisfy a reasonable man that he had acted under a mistake of the law. And courts have sometimes granted relief in such cases ; where it could be done without impairing the rights of those who were not aware of the existence of such mistake when their rights accrued. (*Lawrence v. Beaubien*, 2 *Bail. Law Rep.* 623.) In the case referred to, Judge Johnson, who delivered the opinion of the court, takes a distinction between mere *ignorance* of the law, which is incapable of proof, and a *mistake* of law, which can be established by evidence. He says, the former is passive, and does not presume to reason ; and unless we are permitted to dive into the secret recesses of the heart, its presence is incapable of proof ; but the latter presumes to know when it does not, and supplies parable evidence of its existence. And Senator Paige adopted this distinction, in the case of *Champlin v. Laytin*, (18 *Wend. Rep.* 423 ;) although that case was decided, both in this court and in the court for the correction of errors, upon the ground that the party had acted under a mistake of fact.

In the case under consideration, if the defendant's answer is true, he has made a contract with the complainant to separate ore for ~~his~~ ~~the~~ rate of seven shillings for every legal ton, and

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was carried such contract partially into effect, by separating ore under it for six months, without any knowledge of the alleged ignorance of the complainant that 2000 pounds was a ton. This court, therefore, cannot reform the contract, so as to require the defendant to separate ore at the rate of seven shillings for a gross ton, without making an entirely new contract for him, which he neither made nor intended to make, for himself.

The motion to dissolve the injunction absolutely, must therefore be granted.

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[Criticised, 8 Abb. N. S. 220. Distinguished, 3 Redf. 237, 293. Followed, 15 N. Y. 327.]

A trust, created by will, to invest the capital of a fourth part of the residuary estate of a testator, and to apply the income, or so much as may be necessary, to the support of B. C.'s family, and the education of his children, is such an express trust as is authorized by the 3d subdivision of the 55th section of the article of the revised statutes relative to uses and trusts. For it is a trust to receive the income of the property and apply so much of it as is necessary, to the support of such of the members of B. C.'s family as were in existence at the death of the testator, during the life of B. C., or for a shorter period if he should die before them; and subject to open and let others into the class to be supported from time to time.

But an implied trust to accumulate a part of the income, of a share of the testator's estate, for children or descendants of B. C. who are not in existence at the time when such accumulation is to commence, or whose right to the accumulated fund is entirely contingent, is void, under the provisions of the revised statutes relative to accumulations. And the surplus income of the trust property, so far as it arises from real estate, or the proceeds thereof, if it is not otherwise disposed of by the will of the testator, belongs to his heirs at law; and so far as it arises from the personal estate, it belongs to his widow and next of kin.

Where a power in trust, to executors, to lease the real estate of the testator until it can be sold, would have the effect to suspend the absolute power of alienation in such real estate beyond the time allowed by law, it is void. But the power in trust to sell, in such a case, will still be valid. And the real estate, in equity, will be considered as converted into personalty immediately; where such a conversion is necessary to carry into effect the will of the testator, and to prevent injustice to any of the objects of his intended bounty.

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Where a will contains different trusts, some of which are valid, and others void, or unauthorized by law; or where there are distinct and independent provisions as to different portions of the testator's property, or different estates or interests in the same portions of the property are created—some of which provisions, estates, or interests, are valid, and others are invalid—the valid trusts, provisions, estates or interests, created by the will of the testator, will be preserved; unless those which are valid and those which are invalid are so dependent upon each other that they cannot be separated without defeating the general intent of the testator.

Accumulations of the income of real estate for the benefit of infants, who are in esse at the time such accumulations are directed to commence, and which accumulations must terminate with the minorities of the respective legatees, are valid.

To deprive an heir at law, or a distributee, of what comes to him by operation of law, as property not effectually disposed of by will, it is not sufficient that the testator in his will, has signified his intention that such heir, or distributee, shall not inherit any part of his estate. But to deprive such heir, or distributee, of his share of the property, which the law gives him in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person.

A judgment creditor, by coming in and proving his judgment, as a debt, under proceedings in bankruptcy against his debtor, precludes himself from proceeding farther in a creditor's suit against the debtor, or against his estate which has been acquired subsequent to the decree in bankruptcy; although such proceedings in bankruptcy do not result in the discharge of the debtor.

Notwithstanding the general language contained in the 5th section of the bankrupt act, congress did not intend that the proving of debts, by creditors, under the proceedings in bankruptcy, should be an absolute abandonment of all claim against the future acquisitions of their debtor, where his discharge is refused, or where it is void for any of the frauds specified in the act; but merely that the proving of debts under the decree should be considered as a waiver of the right of the creditors to institute any suits or proceedings, either at law or equity, which are in any way inconsistent with the election of such creditors to obtain satisfaction of their debts out of the property of the bankrupt, under the decree; and a consent to be bound by the discharge, in case the bankrupt should obtain one which was not impeachable for fraud or wilful concealment of his property.

This construction of the bankrupt act will protect the bankrupt from any proceedings against him, either at law or in equity, until it shall be finally settled that he is not entitled to a discharge. And where a discharge is granted, it will likewise protect him against the claims of fiduciary creditors, who have come in and proved their debts under the decree in bankruptcy.

And it seems that a proper construction of the bankrupt act will prevent foreign creditors, who have come in and proved their debts under the proceedings in bankruptcy, from instituting suits in another country against a discharged bankrupt if his discharge was not obtained fraudulently.

But it will not deprive creditors who have come in and proved their debts, and who have successfully resisted the discharge of the fraudulent bankrupt, of all claim to his future acquisitions. Nor will it deprive them of the right, which is given under the 4th section of the act, to impeach the discharge for fraud or wilful con-

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cealment of property, where such fraud is discovered after the discharge has been obtained; if the creditors have not litigated the question of fraud, upon the proceedings in bankruptcy, so as to be estopped, by the decision of the court or jury, from setting up the same matter again.

Where a creditor's bill against a bankrupt, founded upon a judgment recovered previous to the decree in bankruptcy, was filed subsequent to such decree, and before the creditor came in and proved his debt under the proceedings in bankruptcy, and where, at the time such debt was proved, the application for the discharge of the bankrupt was still pending and undetermined; *Held* that it would be inconsistent with the intent and meaning of the 5th section of the bankrupt act, for the complainant to retain the lien he had acquired upon the property of the bankrupt, by the filing of his creditor's bill; so as to enable him to prosecute that suit to effect if the discharge should be subsequently denied.

The 5th section of the bankrupt act does not merely suspend suits, commenced against the bankrupt, in the situation in which they are at the time the creditors come in and prove their debts under the proceedings in bankruptcy; but all proceedings which have been commenced previous to that time are absolutely relinquished, surrendered, and discontinued, by the mere act of proving the debt for the recovery of which such proceedings were instituted.

The decision of the district court of the United States for the southern district of New-York, in the *Matter of King*, (5 *Law Rep.* 320,) that creditors could not file objections and contest the bankrupt's right to a discharge, without having come in and proved their debts under the decree in bankruptcy, questioned, and its correctness doubted.

Under the English bankrupt laws, all the future acquisitions of the bankrupt, down to the time of the obtaining of his certificate, or discharge, belong to his assignees; for the benefit of his creditors who have come in under the commission and proved their debts, until such creditors are fully paid. But under the late United States bankrupt law, the assignee is only entitled to property which the bankrupt owned, or had an interest in, at the time of the decree declaring him a bankrupt; although such bankrupt fails to obtain a discharge.

THIS was an appeal from a decree of the vice chancellor of the first circuit, allowing the several demurrers, of the defendant Barney Corse, and of the executors of the will of his father, Joseph Corse, to the supplemental bill of the complainants; and dismissing such supplemental bill, with costs.

The complainants were judgment creditors of Barney Corse, previous to the presentment of his petition in bankruptcy; and executions had been issued upon their respective judgments, and returned unsatisfied, before that time. On the third of February, 1842, the judgment debtor presented his petition in bankruptcy to the district court for the southern district of New-

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York. And on the 4th of March, thereafter, he was duly declared and decreed to be a bankrupt; and his property was vested in the assignee in bankruptcy. On the 16th of the same month, the bankrupt applied for his discharge; and the court made an order for his creditors, and other persons interested, to show cause on the 19th of June thereafter, why he should not have a discharge from his debts. The proceedings in bankruptcy were in that situation at the time of the filing of the original bill of the complainants in this suit. After the decree in bankruptcy, and before the filing of such original bill, Israel Corse, the father of the bankrupt, died; leaving a widow and four children, his only heirs at law and next of kin.

The decedent, by his will, gave to his widow a specific and a pecuniary legacy, in lieu of her dower, and gave several life annuities, to collateral relatives, without charging them upon his real estate. His son Barney Corse, and one of his daughters, were married; and each of them had five children in esse at the time of the death of the testator. His other two children, a son and a daughter, were then minors and unmarried. And the decedent, by his will, disposed of his residuary real and personal estate as follows:

"I order and direct that one equal fourth part thereof, or the avails thereof, be placed at interest, and the interest or income thereof, during the life of my son Barney Corse, to be applied, at the discretion of my acting executors for the time being, towards the support of his family, and the education of his children, born and to be born; and that the principal of the said one-fourth, and what may remain of the interest or income thereof, be distributed and divided, as soon after his decease as can conveniently be done, unto and among the then living children of my said son Barney Corse, and the issue of such of them, if any, as shall then have deceased leaving lawful issue then living; each child of his then living taking one equal share thereof, and the issue of such of them as shall have then deceased leaving lawful issue then living, if one, solely, if more than one, jointly and equally; taking by representation the

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share or shares which his, her, or their parent or parents would have taken if living.

“One other equal fourth part of my said residuary estate, or of the avails thereof, is to be disposed of as follows: the sum of \$20,000, part thereof, is to be invested or placed at interest, the interest or income thereof to be paid annually, or oftener, as the same shall be received, during the life of my daughter Lydia Ann Thorne, wife of Jonathan Thorne, for her separate use and benefit, free from the debts of her present or any future husband, the principal so to be invested or placed at interest, to be distributed and divided as soon after her decease as can conveniently be done, unto and among the then living children of my said daughter, and the issue of such of them as shall then have deceased leaving lawful issue then living; each child of hers then living, taking one equal share thereof, and the issue of such of them as shall then have deceased leaving lawful issue then living, if one, solely, if more than one, jointly and equally, taking by representation the share or shares thereof which his, her, or their parent or parents would have taken if living. And the surplus of the said last mentioned one-fourth part of my residuary estate, over and above the said sum of \$20,000, is to be paid and delivered over to my said daughter, her executors, administrators and assigns, to and for her and their own proper use and benefit.”

He gave one other fourth to his daughter Mary Corse and her issue, in nearly the same words; except that the surplus beyond the \$20,000, which was limited over to her issue, was not directed to be paid to her immediately, but when she should arrive at the age of twenty-one, or to her executors, administrators or assigns. And the remaining one-fourth of his residuary estate he gave to his son Israel Corse and his issue, in the same manner, substantially; except as to the income of the \$20,000 of that share, which was to be invested during his life. That income was, by the terms of the will, to be paid to the testator's son Israel annually, or oftener, as received, during his natural life, for his use and benefit; or otherwise, *in the discretion of the executors*, to be used and applied. in whole or in part, for

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his use and benefit, and for the use and benefit of such family as he might thereafter have, and in such way and manner as the executors should deem most beneficial. And such part thereof as should remain undisposed of at his death, was to be distributed in the same manner as the capital out of which it arose was directed to be distributed and disposed of.

The will also directed that the testator's two minor children should be educated and supported out of their respective shares of his residuary estate until they severally should arrive at the age of twenty-one. And it contained a further provision that if either of the testator's children should die without leaving lawful issue then living, so that the principal of the investments, or any of them, should not vest in the issue, the principal which should not so vest should go to the testator's then heirs, in such shares and proportions as by the present law of this state they would take in real estate of which the testator might have died seised. This clause of the will, however, was altered by a codicil, which declared that it was the testator's intention that his son Barney Corse should in no event become entitled to any part of his estate, and by which the testator directed that all interest or benefit which his said son could in any event become entitled to, under that clause of the will, should become vested in the children of his said son who should be living at the time of the happening of the contingency, contemplated in such clause. The original will appointed the executors to be the testamentary guardians of the persons and estates of the testator's two minor children; and authorized them, or such of them as should assume the burthen of the execution of the will, or the survivor of them, to sell his real estate; and until such sale, to rent or lease the same.

The codicil gave a life estate to the widow in one of the testator's houses and lots in the city of New-York, and made some changes in respect to the executors. It also made some other devises and bequests, which it is unnecessary to state, as they cannot affect any disposition, made by the will of the testator's residuary estate.

In April, 1842, the will and codicil were proved before the surrogate, and letters testamentary thereon were issued to the

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defendants R. C. Cornell, S. Willets, and J. Thorne, as executors. And on the 11th of June, in the same year, the complainants filed their original bill in this cause against Barney Corse, their judgment debtor, and his children, his brother and sisters, and the children of Mrs. Thorne, together with the executors of the will of Israel Corse, deceased; for the purpose of reaching some supposed interest which Barney Corse had under the will of his father. The bill was in the usual form of creditor's bills, setting forth the recovery of the judgments and the return of the executions unsatisfied; and stating that the judgment debtor had equitable interests, things in action, or other property, of the value of \$100 or more, exclusive of all prior just claims thereon. The bill also stated the death of Israel Corse, the elder, and the making of the will and codicil, the taking out of letters testamentary thereon, and the facts above set forth, as to the situation of his family, &c. and that, at the time of his death, the testator owned real and personal estate to a large amount, and that one-fourth of his residuary estate was worth upwards of \$70,000. The complainants thereupon insisted that the trusts of the will were void as respected the share of Barney Corse, or of his family therein, and that he was entitled to one-fourth of the entire residuary estate of his father. The bill also set out the proceedings in bankruptcy, as far as they had progressed at the filing of such bill, and stated that the bankrupt had not yet received his final discharge and certificate; so that the property received from his father was in no way affected by the proceedings in bankruptcy, but still remained liable to the claim of the complainants. And, in addition to the usual prayer in a creditor's bill, the complainants prayed that the will of Israel Corse the elder might be declared void, so far as the devise of the one-fourth part of the residuary estate to the family of Barney Corse was concerned, and that the same might be decreed to belong absolutely to their judgment debtor; and that the executors might be decreed to pay and apply that part of the estate of the testator to the payment and satisfaction of the judgments of the complainants.

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To this bill Barney Corse appeared, and put in a plea stating the presenting of his petition in bankruptcy, in the form required by the statute, and the decree declaring him a bankrupt; and that in July, 1842, which was after the commencement of this suit, the complainants appeared in the district court, as creditors of the bankrupt, and proved their several debts against him, set out in their bill in this suit, in the manner prescribed in the bankrupt act. The executors, and Mrs. Thorne and her husband, appeared and answered the bill; setting up the same defence in their answers. The other defendants also appeared and answered, by their guardians ad litem; and replications were afterwards filed to the plea and answers.

In March, 1843, the complainants filed their supplemental bill, stating the filing of their original bill, and the proceedings thereon, and that before any further proceedings were had upon such original bill, the defendant Barney Corse, in September, 1842, elected, in the matter of his application for a discharge under the bankrupt act, to go to a jury upon an issue directed by the district court, pursuant to the provisions of the bankrupt act; that the issue to be tried by such jury was whether the bankrupt had admitted into his schedule a false and fictitious debt; that the jury, in January, 1843, found a verdict against the bankrupt and in favor of the affirmative of that issue; and that on the 21st of the same month, the district court made a final order, upon the verdict, that the discharge of the bankrupt be denied him. The complainants further stated, in their supplemental bill, that they proved their debts, upon which the original bill was founded, under the proceedings in bankruptcy, but that such proofs were not made for the purpose of claiming or receiving any dividend, but solely with a view to oppose and defeat the final discharge of the bankrupt; which by the bankrupt act they could not do without proving their debts.

To the supplemental bill the defendant Barney Corse, and the executors, severally, put in general demurrers. And the vice chancellor, without examining the question whether the bankrupt took any interest in the estate of his father, decided

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that the decree in bankruptcy vested all the property of Barney Corse in the assignee in bankruptcy; that by the bankrupt act creditors were not bound to prove their claims to entitle them to come in and oppose the bankrupt's discharge; that they could not come in and prove their debts conditionally and that having proved such debts in the proceedings in bankruptcy, they were precluded, by the 5th section of the bankrupt act, from maintaining any suit at law or in equity for the recovery thereof; and that such proof was a surrender of their judgments, although they succeeded in defeating the discharge of the bankrupt. From the decision and decree made upon the demurrers the complainants appealed to the chancellor.

T. Sedgwick, for the appellants. The complainants having proved their debts, not for the purpose of obtaining a dividend but solely to prevent the bankrupt's discharge, and having effected that object, are not to be in any way prejudiced or affected by it. Any other construction of the statute would involve very injurious and inequitable results. The sole object of the statute is to secure equality among creditors.

M. T. Reynolds, for the respondents. The demurrer is to a supplemental bill, setting up new matter as reviving a lien, which was decided, upon the argument of the plea to the original bill, to have been surrendered. A right of action once waived or surrendered is gone forever. A judgment surrendered is no longer in existence. (*Thomas v. Thompson*, 2 John. 471.) The plaintiffs, by proving their debts, surrendered, that is, released, their judgment. The language of the act of congress is explicit on this point, and is free from ambiguity or obscurity. This provision is unconditional in its terms, and is not qualified by any thing in other parts of the act. The failure of the bankrupt to obtain his discharge was a contingency contemplated and expressly noticed in the act. Congress has provided for it as far as it has thought fit, and has not provided that it shall operate as a waiver of the surrender, or as a revival of the judgment. This is conclusive. The surrender of the judgment takes place as

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soon as the creditor proves his debt. The effect is immediate and irrevocable ; the judgment is thereby surrendered ; that is, ipso facto it ceases to exist. (2 *Taunt.* 246. 18 *Ves.* 290. 1 *Rose's Rep.* 394. *Buck*, 423. 5 *Law Rep.* 165, 227, 228.) A creditor cannot even prove conditionally or for the mere purpose of opposing the discharge, and with a reservation of his right to resort again to his judgment. (5 *Law Reporter*, 447.) Proving his debt is attended with the immediate, final, and conclusive effect of a surrender and release of the judgment. The words of the act being plain and peremptory, must be obeyed ; although no reason could be suggested for the provision. But there is an obvious reason for not allowing the creditor to come in and share in the assets, and yet hold the lien upon the bankrupt's property acquired by his judgment. The decree in bankruptcy is in the nature of a statute judgment and execution, of which the creditor avails himself by proving his debt. It is right, therefore, that he should release his separate judgment, so that property bound by it, or which has been seized under an execution in his favor, shall pass into the hands of the assignees for the benefit of all the creditors.

Judgment debts, and debts not in judgment, are put upon the same footing, as respects the effect of proving them. All debts that are proved are thereby discharged ; that is, all rights of action are gone ; and the creditor has merely a right against the fund in the hands of the assignee. Debts not proved are not discharged unless the bankrupt obtains his certificate. This distinction would be nullified if the appellant's construction should be maintained. The clause respecting the proof of debts was probably borrowed from the English bankrupt acts, where a clause substantially similar has been held to operate ipso facto as an irrevocable surrender of the debt. At all events, the proof of the debt is a complete surrender of the judgment until the court of bankruptcy allows the proof to be withdrawn. While the proof continues in force, the judgment is virtually surrendered.

THE CHANCELLOR. The vice chancellor, from what is stated in his opinion, appears to have overlooked the fact that

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Israel Corse the elder died after the decree in bankruptcy. He therefore did not examine the question whether the judgment debtor had any interest in the residuary estate of his father, either under the will of the latter, or otherwise. That point is not material so far as relates to the judgment debtor himself. For there is a distinct averment in the bill that he has property to the amount of \$100 or more, independent of the claim which the complainants make to one-fourth of the residuary estate of his father. And as he has no title to any property which belonged to him at the time of the decree in bankruptcy, this averment can only be supported by supposing that he has acquired some property since that decree. But so far as the executors are concerned, neither the original nor the supplemental bill can be sustained, against them, unless it appears from the facts stated therein that the judgment debtor has some interest in the estate of his father. For, if he has not, the executors were improperly made defendants; and their demurrer must be sustained; whatever view may be taken of the other questions in the cause.

I have not been furnished with the reasons of the complainants' counsel for supposing that the devise and bequest of one-fourth of the residuary estate of the testator, for the support of the family of Barney Corse during his life, with remainder in fee to his children or issue, is void. And I have looked in vain for any thing to satisfy me that it is so in fact. It does not appear whether Barney Corse had a wife living, but the testator undoubtedly contemplated that he might have one; for he speaks of his son's children, born and to be born. The support of the wife, as well as the children of the son, was therefore probably intended to be covered by the word family in the original will; although in the codicil the testator speaks of this one-fourth of his residuary estate which he had by his will directed to be invested and placed at interest during the life of Barney Corse, and the interest or income, to be applied by the executors, in their discretion, to the support of his children. It is perfectly clear that he did not intend to provide for the support of Barney Corse himself out of that share of the prop-

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erty. For, in the codicil, he says it is his will and intention that his son Barney shall in no event become entitled to any part of his estate.

A trust in the executors, as to this part of the residuary estate, is not created in terms. But, taking the whole will together it is very evident that he intended his executors should invest one-fourth of the residuary personal estate, and one-fourth of the proceeds of the real estate which they were to sell for the purposes of the will, and hold the same as executors during the life of Barney Corse; and should accumulate the interest or income which they should not think it necessary to expend for the support of the family in the meantime. And the testator intended that after the death of Barney Corse, the principal of that fourth of the estate, together with the accumulations thereon, should go to his children then living, and to the issue of those who had died, per stirpes. So far as regards the trust to invest the capital of this fourth of the residuary estate, and to apply the income, or so much as may be necessary, to the support of Barney Corse's family and the education of his children, it appears to be such a trust as is authorized by the 3d subdivision of the 55th section of the article of the revised statutes relative to uses and trusts. (1 R. S. 728.) For it is a trust to receive the income of the property, and to apply so much of it as is necessary to the support of such of the members of Barney Corse's family as were in existence at the death of the testator, for life, or for a shorter period if Barney Corse should die before them; and subject to open and let others into the class, from time to time. It is true, such an interest, in the income of the estate, may suspend the absolute ownership of the property, during its continuance. But as that absolute ownership is in no event to be suspended beyond the life of Barney Corse, which is only during the continuance of one life in being at the death of the testator, this portion of the will does not contravene the provisions of the revised statutes in that respect. And, for the same reason, the contingent limitations over of the capital of this fourth part of the testator's estate, in fee, upon the death of Barney Corse, are valid.

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The implied trust, however, to accumulate any part of the income of this share of the testator's estate, for children or descendants of Barney Corse who were not in existence at the time when such accumulation was to commence, or whose right to the accumulated fund is entirely contingent, is undoubtedly void under the provisions of the revised statutes relative to accumulations. (1 R. S. 726, §§ 37, 38. *Idem*, 773, §§ 3, 4.) And such surplus income, so far as it arises from real estate or the proceeds thereof, if it was not otherwise disposed of by the will of the testator, would belong to his heirs at law; and so far as it arises from the personal estate, would belong to his widow and next of kin.

I am inclined to think, however, that for the present, the whole of this surplus income is validly and effectually disposed of by the will; although in the event of some contingencies, which may happen, certain future interests in the income of this share of the testator's estate, which are attempted to be created by the will, during the life of Barney Corse, may not be valid under other provisions of the statutes. The 40th section of the article of the revised statutes relative to the creation and division of estates, (1 R. S. 726,) provides that when, in consequence of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation, or of the ownership, during the continuance of such suspense the rents and profits of the property are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate. And this rule also applies to a future interest in personal estate, by another section of the revised statutes. (1 R. S. 773, § 2.) In the case under consideration, the five children of Barney Corse who were in esse at the death of the testator, are presumptively entitled to the next eventual estate in this fourth part of his property. And I see nothing to prevent them from taking the whole of the income thereof, which is not effectually disposed of by the will, during the time they continue to be thus presumptively entitled. Nor do I see any difficulty in permitting after born children to come in and share in the income which

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may accrue after they become presumptively entitled to a share of the next eventual estate in the capital of the fund or property out of which such income is to arise.

If the authority given to the executors, to lease the real estate until it can be sold, has the effect to suspend the absolute power of alienation, in that part of the testator's property, beyond the time allowed by law, it is void. But the power in trust to sell would still be valid; and the real property must, in equity, be considered as converted immediately into personalty, where it is necessary to carry into effect the will of the testator, and to prevent injustice to any of the objects of his intended bounty. (*Van Vechten v. Van Vechten*, 8 *Paige's Rep.* 104.) For, where a will contains different trusts, some of which are valid and others void, or unauthorized by law, or where there are distinct and independent provisions as to different portions of the testator's property, or where different estates or interests in the same portions of the property are created, some of which provisions, estates or interests, are valid, and others invalid, the valid trusts, provisions, estates or interests, created by the will of the testator will be preserved; unless the valid and the invalid are so dependent upon each other that they cannot be separated without defeating the general intent of the testator. (*Darling v. Rogers & Sagory*, 22 *Wend. Rep.* 483. *Parks v. Parks*, 9 *Paige's Rep.* 117.)

There is also a void trust, for the accumulation of so much of the income of \$20,000 of Israel Corse junior's fourth of the residuary estate as the executors in their discretion shall not think proper to pay over to him, or apply to his support or that of his family, if he should have one. That portion of the income, however, is not undisposed of by the will; although Israel junior had no children at the death of the testator. For by the provisions of the will and codicil, his two sisters, and the children of his brother Barney who were then in esse, were presumptively entitled to the next eventual estate in that part of the testator's property; and they are entitled to so much of the income as is not validly and effectually disposed of in some other way. But if Israel should marry and have issue, such issue would then

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be presumptively entitled to the next eventual estate in the property from which such income was thereafter to arise ; and they would have the right to such income, while thus presumptively entitled to the capital of that part of the testator's property.

The income of \$20,000 of Mrs. Thorne's fourth of the residuary estate for life, and the capital of the residue of that fourth, is given to her immediately, upon the death of the testator, through the medium of the executors ; and the trust to receive the income of the \$20,000 and pay it over to her, from time to time, is a valid trust. And the limitations over of the capital of the \$20,000, of that fourth of the estate of the testator, in the different contingencies contemplated by him in his will and codicil, are all valid. The dispositions made by the will, of the principal and income of the \$20,000 of Mary Corse's one-fourth of the testator's residuary estate, are valid, for the same reason.

The surplus of the shares of Mary Corse and Israel Corse junior, beyond the \$20,000 carved out of each share, is to be paid and delivered to them respectively when they shall arrive at the age of twenty-one. These are immediate gifts of the property. And there is an implied trust, for the executors and guardians to accumulate the income, during the minorities of the legatees respectively, for their use and benefit ; beyond the portion of such income which the executors and testamentary guardians shall think proper to apply for the support and education of these minors, in the meantime. And as these accumulations are for the benefit of infants who were in esse when such accumulations were directed to commence, and must terminate with the minorities of the respective legatees, they are valid. All the testator's interest in those portions of the property are effectually disposed of by his will, whether the minors do or do not attain the age of twenty-one.

The only interest, therefore, which Barney Corse had in the estate of his father, at the time of the filing of the bill in this cause, must depend upon a remote contingency ; and can only vest in him or his assigns, as an interest in possession, by the death of all his children during his life. For the contingent interest which was given to him by the original will, as one of

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the surviving heirs of the testator, in the \$20,000 carved out of each of the shares of his brother and sisters, in case such brother and sisters, or either of them, should die without leaving issue, is, by the codicil, given to his children, if he shall have any living when the event happens. But if the event contemplated by the original will of the testator, viz. the death of either of the sisters, or the brother of Barney Corse, without leaving issue, should happen during the life of Barney, and after the death of all his children, he would be entitled to some interest in the capital of \$20,000 of the share of the brother or sister dying without issue. And that contingent interest, if it is of any value, may now be reached by this creditor's bill, and sold for the benefit of the complainants, if they are in a situation to prosecute a creditor's suit against him.

It is true, as I have before observed, the testator by the codicil declares that it is his will and intention that his son Barney shall not, in any event, become entitled to any part of his estate; and he therefore revokes the contingent limitation over to those who should then be his heirs, so far as Barney is concerned. But the original will directed the capital of the \$20,000, in the event contemplated, to be divided among those who should be the testator's heirs at the happening of the contingency; and in the proportions in which they would take his real estate if he had died seised thereof at that time. And the share which Barney Corse would have been entitled to under the original will, is only disposed of by the codicil in case he has children living at the time of the death of the brother or sister without issue. Barney, therefore, in the events I am now contemplating, would still be entitled to an interest in the portion of the capital of the \$20,000, not effectually disposed of by the will. And he would take his interest in that portion of the capital, not under the will of the testator, but as one of his original heirs at law and next of kin of the testator at the time of his death. For it is not sufficient, to deprive an heir at law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention, by his will, that his heir or distributee should not in-

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herit any part of his estate. But to deprive an heir or distributee, of his share of the property which the law gives him, in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person. (*Denn v. Gaskin*, *Cowp. Rep.* 657.)

In relation to the fourth of the estate which is given to the executors, for the use of Barney Corse's family during his life, and to his children and issue after his death, it is effectually disposed of by the will after his death, even if he should die without issue. For in that event it is to go to the then heirs of the testator, under the provision of the original will on that subject; and in the proportions which they would take in the testator's real estate if he had died at that time. So that if all the descendants of the testator should be dead, his collateral heirs then in existence would take the property, under the will. And those who were presumptively entitled to this ultimate remainder in fee, would, under the provisions of the revised statutes, have a right to the income of that fourth of the estate, if the issue of Barney Corse should become extinct before the time appointed by the will for the ultimate remainder in fee to vest in possession. But there may be some contingent interests in the income of the other shares, in the event of the death of all the issue of Barney Corse in his lifetime, in which he will be entitled to share; as interests in the testator's property not effectually disposed of by the will.

It is evident, however, that these interests of Barney Corse, in the estate of his father, and to which he may be entitled upon the happening of the contemplated event, are so very remote as not to be worth the extra costs and expenses of a chancery suit to reach them by a creditor's bill. But as they are probably worth something, the demurrer of the executors cannot be allowed upon the ground that the judgment debtor had no interest whatever, in the estate of their testator, at the time of the filing of the original or the supplemental bill in this cause. I shall therefore proceed to consider the question whether the complainants have deprived themselves of the right to further prosecute their creditor's bill against Barney Corse, and against

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his estate acquired subsequent to the decree in bankruptcy, by coming in and proving their judgments, as debts, under the proceedings in bankruptcy.

Under the English bankrupt laws, the assignment gives to the assignees not only the property which the bankrupt has at the time of the assignment, but also all that he shall afterwards acquire or become possessed of, by devise, descent, bequest, or otherwise, before he shall have obtained his certificate. (*Stat. 6 Geo. 4, ch. 16, §§ 63, 64.*) An uncertificated bankrupt, under the English law, is therefore incapable of trading or contracting for his own benefit; and all the property which he at any time acquires belongs to the assignee, for the benefit of the creditors who come in and prove their debts under the proceedings in bankruptcy. (*Martin v. O'Hara, Cowp. Rep. 824. Evans v. Mann, Idem, 569. Ex parte Proudfoot, 1 Atk. 252.*) It is therefore of very little use for a creditor, in England, to proceed against the uncertificated bankrupt, in an ordinary suit, where he has a right to come in and prove his debt under the commission. Previous to the statute 49 Geo. 3, ch. 121, § 14, there was no positive rule of law prohibiting a creditor of the bankrupt, who had proved his debt for a special purpose, and without intending to claim a dividend of the estate, from proceeding by suit against the bankrupt to compel payment of the debt which had thus been proved. Thus, in *Ex parte Salkeld*, (1 *P. Wms. Rep.* 561,) which came before Lord Mansfield in 1719, a creditor who had come in and proved his debt to prevent the bankrupt's discharge, where he thought it necessary to do so for that purpose, was permitted to imprison the fraudulent bankrupt, upon waiving all claim to his estate under the commission. And in *Ex parte Capot*, (*West's Ch. Rep.* 633,) which was before Lord Hardwick about twenty years afterwards, his lordship allowed a creditor, who had not only proved his debt but had received two dividends thereon, to proceed against the bankrupt at law; upon restoring the dividends, and electing to relinquish all claim to his estate under the commission. He also allowed the creditor, who elected to relinquish all claim to the bankrupt's estate, to prove his debt for the purpose of assenting to or dissent

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ing from the granting of a certificate. But the chancellor, in the exercise of the summary power which he had over suitors, previous to any statutory provision on the subject, would compel a creditor, who came in and proved a debt for the purpose of getting the benefit of the proceedings under the commission, to elect between that and other remedies for the recovery of his debt. And this principle, of holding parties to their election, was subsequently followed by the court of common pleas, in the exercise of its summary jurisdiction for the relief of the bankrupt's bail; although there was then no statute in force making the proof of a debt, under the commission in bankruptcy, a conclusive election not to proceed at law; so as to make such proof of the debt a bar to a suit therefor. (*See Aylett v. Harford*, 2 *W. Black. Rep.* 1317.) The court of king's bench, however, in the case of *Oliver v. Ames*, (8 *T. R.* 364,) refused to discharge a bankrupt out of custody, upon common bail, although the plaintiff had proved his debt under a commission of bankruptcy against the defendant, and had received a dividend thereon. But that court enlarged the rule upon the sheriff, to bring in the body of the defendant, in order to enable the latter to apply to the lord chancellor for summary relief.

This principle of holding the creditor, who had come in and obtained a dividend under the commission, to his election, protected the bankrupt from proceedings at law against him, even if he had not obtained his certificate. For all his future acquisitions being liable to be seized by his assignees, the lord chancellor held that the two remedies of the creditor were inconsistent with each other; and that the creditor could not claim under the commission, and at the same time resort to a different remedy for the recovery of his debt. The great seal therefore, in the exercise of its jurisdiction in bankruptcy, compelled the creditor to abide by his election in such a case; although the proof of the debt under the commission was not a bar at law. But the statute 5 *Geo. 2, ch. 30, § 9*, declared that if a second commission issued against a bankrupt, who had previously been discharged, the certificate under the second commission should exempt his person from arrest and imprisonment, but that his

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future estate and effects should remain liable to his creditors. The question herefore arose, whether a bankrupt who had been discharged the second time, but whose estate did not yield fifteen shillings in the pound, could be sued at law to recover satisfaction out of his subsequent acquisitions; or whether such acquisitions belonged to the assignees in bankruptcy, under the second commission, for the payment of the debts of the creditors who had come in and proved under such second commission. This question was presented directly to the court of king's bench, for the first time, in 1793, in the case of *Philpott v. Corden*, (5 T. R. 287,) and that court decided that the proper way to reach the future acquisitions of the bankrupt was by an action at law; although it was not directly decided, in that case, that the assignee under the second commission had no interest in the effects of the bankrupt which were acquired after the allowance of his certificate. But in *Hovil v. Browning*, (7 East's Rep. 159,) which came before the same court thirteen years afterwards, it was expressly decided that the future acquisitions of the bankrupt vested in the assignees under a third commission; the creditors under the second commission not having in the meantime reached them by execution.

Such was the state of the law in England when the statute, 49 Geo. 3, c. 121, was passed. The 14th section of that statute declared that the proving of a debt under a commission against the bankrupt, should be deemed an election by the creditor to take the benefit of such commission with respect to the debt so proved. But the statute made no provision for vesting in the assignees, under a second commission, the estate which the bankrupt might acquire subsequent to the allowance of his second certificate. The question then arose, whether the act was a bar to an action by the creditor who had come in and proved his debt, under a second commission which had not produced 15 s. in the pound. This question first came before the court of king's bench, about five years after the passage of that act, in the case of *Read v. Sowerby*, (3 Maule & Selw. Rep. 78.) And that court decided that the 14th section of the statute referred to was a bar to an action for the debt;

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and that the creditor had no other remedy, for the recovery of his claim, than that which the proof of the debt under the commission gave him. The same question came before Lord Eldon, the next year, in *Ex parte Hodgkinson*, (2 *Rose's B. Rep.* 172.) And his lordship decided that the acquisitions of the bankrupt, after the granting of his certificate under the second commission, did not vest in the assignees, although the bankrupt's estate was insufficient to pay 15s. in the pound; that each creditor might bring an action for the purpose of reaching such subsequently acquired property; and that if the bankrupt pleaded his certificate, the creditor might reply that it was a certificate under a second commission and 15s. in the pound had not been paid. (See 19 *Ves.* 293, *S. C.*) The question again came before Sir John Leach, as vice chancellor, in 1821, in *Ex parte Buckle*, (1 *Glyn & Jam. Rep.* 33,) and his honor held that the 14th section of the statute 49 *Geo.* 3, *ch.* 121, only meant that the fact of proving the debt should be a conclusive election to proceed under the commission; and that it did not touch the ultimate remedies given to creditors who fully adopted the commission. He also held that as the bankrupt's estate did not pay 15s. in the pound, a creditor who had proved his debt under a second commission, might proceed by action against the bankrupt, for the purpose of charging the subsequently acquired estate. (See also *Butler v. Hobson*, 7 *Dowl. Pr. Ca.* 163.)

The question thus in conflict between the two courts was obviated by the statute, 6 *Geo.* 4, *c.* 16; which repealed all the previous laws on the subject of bankruptcies, and consolidated most of their provisions in a new act. That act, in addition to the provisions giving to the assignees of an uncertificated bankrupt all his future acquisitions, until his creditors who came in and proved their debts under the commission were fully satisfied, gives to the assignees under a second commission, which does not produce 15s. in the pound, the future acquisitions of the bankrupt, for the benefit of the creditors who have proved their debts. And it gives to the bankrupt the right to plead his certificate in bar; without reference to the question

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whether it was granted under a first or a second commission. (*See Stat. 6 Geo. 4, c. 16, §§ 63, 64, 126, 127.*) It also re-enacts the provision of the 14th section of the statute 49 Geo. 3, prohibiting a creditor who has instituted any suit against the bankrupt for a debt provable under the commission, from proving such debt, or having any claim entered upon the proceedings in bankruptcy, without relinquishing such suit; and declares that the proving or claiming a debt under the commission, by any creditor, shall be deemed an election by the creditor to take the benefit of such commission in respect to the debt so proved or claimed. (*Idem, § 59.*) It has been held however, notwithstanding this provision, that the proof of one separate and independent debt under the commission, did not deprive the creditor of an uncertificated bankrupt of the right to bring a suit for another debt which had not been claimed or proved under such commission. (*Harley v. Greenwood, 5 Barn. & Ald. 95.*) In the case last referred to, the court of king's bench also decided that proof of the same debt under a commission, could not be pleaded as a *bar* to an action to recover the debt against an uncertificated bankrupt; and that the fact that the plaintiff had proved his debt under the commission, only furnished ground for an application to the court in which the suit was pending, to stay the proceeding; or for an application to the great seal to expunge the proof of the debt.

The fifth section of our bankrupt act of 1841, appears to have been framed with a view to obviate some of the difficulties which had arisen under the English bankrupt laws. For, instead of prohibiting a creditor from coming in and proving a debt, under the proceedings in bankruptcy, until he should have relinquished any suit which he had previously instituted for the recovery of that debt, as he is bound to do in England, this section of our act, of 1841, declares that the mere act of proving a debt under the proceedings in bankruptcy, shall of itself be deemed a surrender of all proceedings already commenced, and of all unsatisfied judgments already obtained on such debt. And, instead of declaring the proof of the debt to be an election by the creditor to take the benefit of the pro-

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ceedings in bankruptcy in respect to such debt, our statute declares that "no creditor, or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit in law or equity therefor; but shall be deemed thereby to have waived all right of action and suit against such bankrupt." (*Owen on Bank. App.* 55.) The general result of these provisions would have been the same as those of the English bankrupt act, for which they were a substitute, if our statute had contained the other provisions of that act in relation to the future acquisitions of the bankrupt; where he does not succeed in obtaining his discharge, or where his property under a second commission does not produce 15 s. in the pound of the debts proved and allowed. The third section of the bankrupt act of 1841 merely declares that all the property and rights of property of a bankrupt, who shall be declared such by a decree of the court, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of him and vested in the assignee appointed by the court. Under this section, the late Judge Story, in *Ex parte Newhall*, (2 *Story's Rep.* 363,) decided, and I think correctly, that the future acquisitions of the bankrupt, subsequent to the decree, belonged to the bankrupt and not to his assignee. He there says: "The English statutes of bankruptcy go further, and vest in the assignee all the property of the bankrupt which comes to him by descent, distribution, or otherwise, before the discharge is obtained. But this doctrine stands only upon the positive language of those statutes, and not upon any general principles of law applicable to the subject." And Chief Justice Shaw, in the case of *Fisher v. Currier*, (7 *Metc. Rep.* 427,) says: "We take it to be settled that the property of a bankrupt which passes to his assignee, is all the real and personal property and all the rights of property vested in him at the time of the decree declaring him a bankrupt; and that after-acquired property does not go to the assignee." This was said in reference to the rights of a bankrupt whose discharge had been refused by the proper tribunal; which was the case then under consideration.

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One of the questions presented in the present case then, is, whether a creditor who comes in and proves his debt, for the purpose of opposing the discharge of the bankrupt, because he supposes it is absolutely necessary to prove his debt to authorize him to make such opposition, is thereby absolutely barred from all claim against the property which his debtor acquires subsequent to the decree in bankruptcy; although such creditor succeeds in establishing the fact that the proceedings of the bankrupt were fraudulent, and the discharge is refused on that ground? The complainants undoubtedly supposed it was necessary to prove their debts, to enable them to oppose the discharge, as they have averred in their bill. For the court before which the proceedings in bankruptcy of their debtor were pending, had decided, in the matter of *Brown King's* bankruptcy (5 *Law Reporter*, 320,) that creditors, as such, could not file objections and contest the right of the bankrupt to a discharge without first proving their debts. I am inclined to think, however, this was an erroneous construction of the statute; and that the framers of the law intended to give all persons interested in opposing the bankrupt's discharge, as well as the creditors who had proved their debts against him, the privilege of appearing and contesting his right to such a discharge. Indeed if the counsel for the respondent is right in supposing that the proof of a debt, under the proceedings in bankruptcy, is an absolute bar to all claims upon the future acquisitions of the bankrupt, even when the discharge is denied, those who have not proved their debts are the only class of creditors who have any interest in opposing the bankrupt's discharge. For, in that case, it must be a matter of entire indifference to those creditors who have proved their debts, whether the discharge is or is not granted; as their rights would be precisely the same in either event. And it would be absurd to suppose that the framers of the act had made this provision, authorizing the creditors who had proved their debts specially, and all *other* persons in interest generally, to come in and oppose the discharge, if, by another provision of the same statute, the mere fact of having proved their debts was to deprive them of all claim upon the

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person or future acquisitions of the bankrupt, even if their opposition to the discharge was successful. I conclude, therefore, notwithstanding the general language contained in the fifth section of the act—that the creditors who come in and prove their debts shall not be allowed to maintain any suit at law or in equity therefor—the lawmakers did not intend that the proving of debts, by creditors, should be an absolute abandonment of all claim against the future acquisitions of their debtor, if his discharge was refused, or if it was void for any of the frauds specified in the act; but merely that the proving of debts, under the decree, should be considered as a waiver of the right of the creditors to institute any suits or proceedings, at law or in equity, which were in any way inconsistent with the election of such creditors to obtain satisfaction of their debts out of property of the bankrupt under the decree; and as a consent to be bound by the discharge, in case the bankrupt should obtain one which was not impeachable for fraud or wilful concealment of his property.

This construction of the bankrupt act, would of course protect the bankrupt from any proceedings against him, at law or in equity, until it should be finally settled that he was not entitled to a discharge. In case a discharge was granted, it would likewise protect him against the claims of fiduciary creditors, who had come in and proved their debts under the decree in bankruptcy; as the supreme court of the United States decided in the case of *Chapman v. Forsyth*, (2 How. U. S. Rep. 202.) And it would probably prevent foreign creditors, who had come in and proved their debts under the proceedings in bankruptcy, from instituting suits in another country, against a discharged bankrupt, if his discharge was not fraudulently obtained. For even foreign tribunals might consider such a waiver of all right of action and suit, either at law or in equity, by the creditors who had come in and taken their chances for a dividend of the estate of the discharged bankrupt, to be binding upon such creditors there, as well as here; although the discharge, itself, without such a waiver, might have no binding force beyond the limits of the United States. This rational

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construction, which I am disposed to put upon this provision of the statute, would not, however, deprive creditors who had come in and proved their debts, but who had successfully resisted the fraudulent bankrupt's discharge, of all claim to his future acquisitions. Nor would it deprive them of the right, which is given under the fourth section of the act, to impeach the discharge, for fraud or wilful concealment of property, in case such fraud should be discovered after the discharge had been obtained; where they had not litigated the question of fraud upon the proceedings in bankruptcy, so as to be estopped, by the decision of the court or jury, from setting up the same matter again. And it would give full effect to the 12th section of the bankrupt act, relative to the payment of seventy-five per cent upon debts proved under a second decree in bankruptcy; so as not to bar the creditors of all right to future acquisitions, where such creditors had come in and proved their debts for the purpose of showing that the bankrupt's assets were not sufficient to pay 15s. in the pound.

I am not aware that this question has before arisen and been directly decided in this country; though several judges, when speaking in reference to suits by creditors, while the proceedings in bankruptcy were pending, and before a final decision of the court denying the bankrupt's application for a discharge, have said that a creditor who had come in and proved his debt could not sue the bankrupt. And the conclusion to which I have arrived has not been come to without considerable hesitation. But my opinion is founded upon the fact, that to give the construction to the general language of the fifth section of the bankrupt act which is contended for by the counsel for the respondents, would be to make that provision of the statute wholly inconsistent with the evident intention of the lawmakers; as evinced by several other provisions of the same act.

This, however, does not dispose of the case now before me, in favor of the appellants. For, upon another ground, I think the supplemental bill cannot be sustained. The original bill of the complainants was founded upon a judgment recovered previous to the decree in bankruptcy; and it was filed before they

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came in and proved their debts under the decree. And when those debts were proved, the proceedings in bankruptcy were still pending. It could not be known, therefore, when the complainants came in and proved their debts, that the discharge of the bankrupt would be denied. And it was utterly inconsistent with the evident intent and meaning of the fifth section of the bankrupt act, that the complainants should retain the lien they had acquired upon the property of the bankrupt, by the filing of their creditor's bill, so as to enable them to prosecute the suit to effect if the discharge should be subsequently denied. The statute does not merely suspend suits in the situation in which they are at the time the creditors come in and prove their debts. But all proceedings which have been commenced before that time are absolutely relinquished, surrendered, and discontinued; by the mere act of proving the debt for the recovery of which such proceedings were instituted. In the case of *Everett v. Derby*, (5 *Law Reporter*, 225,) before the district court of the United States for the state of Maine, Judge Ware says, "where a suit has been commenced, for the recovery of the debt, before the proof is made under the decree in bankruptcy, the proving of the debt operates as a surrender, *ipso jure*, of the action; and is a bar to any further proceedings in that suit."

In this case, the suit upon the original bill of the complainants, by the proof of their debts under the decree in bankruptcy, had been surrendered and discontinued, at the time the plea of the defendant Barney Corse was put in. Instead of pleading the proof of the debts in bar, therefore, he should have applied to the vice chancellor to dissolve the injunction and to stay all further proceedings in the suit; upon the ground that such suit was discontinued, as to him, by operation of law. And the complainants should not have taken issue upon a plea which was undoubtedly true, at the time it was pleaded, and when the replication thereto was filed; but they should have applied to have the plea taken off the files, and to have the suit dismissed upon the records of the court, without costs as to the bankrupt. And as they had, by their own act, rendered it im-

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possible to proceed any farther in the suit as to the other defendants therein; they should immediately, upon proving their debts under the decree in bankruptcy, have dismissed their bill as to them.

The decree of the vice chancellor allowing the demurrers, and dismissing the supplemental bill as to the respondents, must therefore be affirmed with costs.

 SMITH, adm'r, &c. vs. KEARNEY.

Where a legatee or distributee of an estate owes a debt to the testator, so much of such debt as can be collected by the executor, including the interest due at the testator's death, is to be considered and treated as a part of the capital of the estate; and must be apportioned and distributed accordingly.

If the whole amount of such debt, and interest, can be collected or received, by the retainer of the income, by the administrator, the interest which has accrued upon the amount which was due at the death of the testator is properly distributable among those who have present interests in the personal estate of the testator; and the sum due at the death of the testator is to be considered and treated as a part of the capital of his personal estate.

But, in such a case, it would be inequitable in reference to the rights of persons to whom the testator has bequeathed life interests in his estate, for the administrator, to invest as capital, for the benefit of the remaindermen, from the time it was retained, the whole amount received and retained on account of the debt due to the estate, during the life of the debtor. On the contrary, a proportionate part of the receipts, subsequent to the death of the testator, where the whole debt, with the interest which has accrued thereon after his death, cannot be collected, should be considered as interest accrued and received upon the capital of the estate; and should be paid over to those who are entitled to life interests in such capital.

And the proper way to apportion partial payments between the persons entitled to the life interests, and the remaindermen, in such a case, is to consider as capital, so much of the amount, as with the legal interest thereon from the death of the testator, will produce the whole principal and interest collected and which is to be apportioned.

In distributing a fund received and retained, by the executor, on account of a debt due from a legatee or distributee, to the estate of the decedent, where the legatees and the widow, and the next of kin of the testator, had a vested interest in such debt from the time of his death, although the contingency upon the happening of which that interest was to vest in possession did not occur until some of them were dead, the executor must apportion the same, among the legatees, and widow

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and next of kin, and those who may be their representatives from time to time, in the same manner, or rather so as to produce the same effect, as if the fund had been received and retained by such executor immediately after the death of the testator.

The contingent right which a person has in the estate of another, arising from the chance that he may be entitled to a share in such estate, as one of the next of kin of the owner thereof, should he outlive him, is only a bare possibility, unaccompanied by any interest during the life of such owner; and it cannot be reached by a creditor's bill.

The right of an executor or administrator to retain the whole, or a part, of a legacy, or distributive share, in discharge or satisfaction of a debt due from the legatee or distributee to the estate, is not only consistent with the soundest principles of equity, but is perfectly well settled by the adjudications of the courts.

This right of retainer depends upon the principle that the legatee or distributee is not entitled to his legacy, or distributive share, while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid, or which is necessary to extinguish other claims on those funds. And it is against conscience that he should receive any thing out of such funds without deducting therefrom the amount of the funds which is already in his hands, as a debtor to the estate. And the assignee of the legatee, or distributee, in such a case, takes the legacy or distributive share subject to the equity which existed against it in the hands of the assignor.

But this principle of equitable retainer does not apply to a fund arising from the sale of real estate which descended to the debtor as one of the heirs at law of the testator; and which real estate has been converted into personalty by accident, or because the valid portions of the will could not be carried into effect in any other way than by a sale of the land.

The proceeds of real estate, thus converted into personalty, are still to be considered as real estate, and as in no way connected with the funds which come to the hands of the executor for the purposes of the will.

Neither does the right of equitable retainer, on the part of the executor, extend to an interest in the proceeds of real estate which has not come to the debtor under the will of the testator, nor as one of his heirs at law; but which has been derived from another person, to whom such estate had previously descended as one of the heirs of the testator.

Where a power in trust, to an executor to sell the real estate of the testator, upon the death of the widow, for the benefit of legatees, is an imperative power, the estate is in equity to be considered as converted from the death of the widow; so as to give the legatees the same interest in the rents and profits, until the estate is actually sold, as they would have had in the interest of the proceeds of the sale if such sale had been made immediately upon the death of the widow.

THIS was an application, on the part of the complainant, under a reservation made in a decree in this cause, for directions as to the distribution of a portion of the fund in his hands, as

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administrator with the will annexed, and as substituted trustee in the place of the executors of John Clendining, deceased.

The testator died in 1836, leaving a widow, and six children, John, James, Sarah the wife of William Hogan, Margaret the wife of H. W. Bulkley, Letitia the wife of Stuart Mollan, and Jane who subsequently married Edward Kearney, his only heirs at law. The provisions of the will of the testator are stated in the report of the decision of this court, upon the bill filed by the former administrator with the will annexed, for the construction and determination of the validity of certain provisions of the will, which were then in controversy. (*See De Peyster v. Clendining*, 8 *Paige's Rep.* 296.)

At the time of the death of the testator, in 1836, his son John Clendining, junior, was indebted to him in a very large sum, for a balance due to a former partner of the son, in relation to their partnership transactions; which balance had been assigned to the testator, by such former partner of the son. In October, 1838, the administrator, with the will annexed filed a bill, in this court, before the vice chancellor of the first circuit, for the recovery of the assigned debt thus due to the estate of the testator; and in April, 1839, the vice chancellor made a decree in that cause, against John Clendining, jun., for the payment of about \$106,000, with interest and costs. An execution was afterwards issued upon that decree, for the collection of the amount thereof, but was returned by the sheriff entirely unsatisfied.

In April, 1837, Lord & Corbett obtained a judgment, in the supreme court, against John Clendining, junior, for about \$43,000, for a debt due from him to them; upon which judgment an execution was issued and was returned wholly unsatisfied. And in May, 1838, as a collateral security for the payment of that judgment, Clendining assigned, to Lord & Corbett, all his right, claim and interest in the estate of his father, whether the will was or was not valid. Subsequent to this assignment, and previous to 1840, Letitia Mollan, one of the daughters of the testator, died, without issue, leaving her husband surviving. And in November, 1840, F. De Peyster, the

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then administrator, with the will annexed, of John Clendining deceased, and who had then been also appointed trustee, under the decree of this court, of June, 1840, made pursuant to the decision reported in the 8th volume of Paige's reports before referred to, filed a creditor's bill against John Clendining the younger; to which bill Lord & Corbett were also made parties defendants. That bill stated the making of the decree in favor of the then complainant, against John Clendining the younger, for the debt due to the testator, and the return of the execution upon that decree unsatisfied, the judgment of Lord & Corbett, and the assignment to them of the interest of their judgment debtor in his father's estate, as collateral security for the payment of that judgment. It also stated the death of the testator; the making of his will; the bequest of the income of the proceeds of one-seventh of the testator's real and personal estate, to John Clendining the younger; the filing of the bill by the administrator with the will annexed, for the settlement of the questions as to the construction and validity of the several provisions in the will which were in dispute between the widow and heirs; the making of the decree in this court in June, 1840; and the particular provisions of that decree, which were inserted therein, as directed in the reported decision of the chancellor. The complainant in such creditor's bill also claimed and insisted that the share or portion of John Clendining the younger in the estate of his father, as declared by the decree of the chancellor, was subject to the payment and satisfaction of the debt, due to the estate, as ascertained and settled and directed to be paid, by the decree of the vice chancellor; and that the complainant had an equitable right to retain the share of the proceeds and income, decreed by the chancellor to belong to John Clendining the younger, and apply them towards the satisfaction of the debt which the latter owed to the estate, whether the same belonged to him as devisee, or legatee, or as one of the heirs of the testator, or otherwise; and that neither he, nor Lord & Corbett as his assignees, had any right or claim to that share of the estate or any part thereof, until the debt due to the estate was fully satisfied. And the complainant, in addition to the usual prayer

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in a creditor's bill, prayed for such further or other relief in the premises as should be just.

John Clendining the younger suffered that bill to be taken as confessed against him ; but Lord & Corbett appeared and answered, and the cause was heard upon pleadings and proofs as against them, before the assistant vice chancellor of the first circuit. In January, 1842, he made a decree directing the defendant, John Clendining, to pay the amount of the former decree with interest and costs ; and in case of non-payment, that the complainant should be authorised to have, take and retain to himself, all and singular the portion which by the will of John Clendining the elder was given to his son John, and also all that portion of the personal estate of the testator which by the decree of the chancellor was decreed to the testator's son John, *as heir at law and distributee* of the personal estate, and also of all and every such portion thereof as might, by any of the contingencies mentioned in the chancellor's decree, belong to him *as such heir* ; to be applied to the payment of the debt and costs due to the complainant as administrator and representative of the estate. And prohibiting each and every of the defendants in that suit from instituting any proceedings against the complainant for retaining and applying such share or portion in that manner, until the debt and costs should be fully satisfied. The decree also provided for the payment of the surplus, if any, to Lord & Corbett, as the assignees of the interest of John Clendining the younger in his father's estate.

In May, 1843, Margaret Clendining, the widow of the testator, died ; without having executed the power given her by the will, to dispose of the plate and household furniture among the children of the testator. And other questions having arisen in consequence of her death, and the death of Letitia Mollan, in relation to the sale of the farm, and as to the distribution of the household furniture and plate, and the right to the rents and profits of the farm, subsequent to the death of the widow and before an actual sale thereof could be made, a petition was presented to the chancellor, in the suit before him, pursuant to the reservation in his decree authorizing the same, for further in-

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structions and directions in the premises. He thereupon decided that the reversionary interest in the testator's plate and household furniture was not undisposed of by the will, in the event which had happened; that the power to the widow, to make such disposition thereof as she pleased among the children of the testator, at her death, gave her a life estate therein, with a power of appointment, which was imperative under the provisions of the revised statutes relative to powers, (1 R. S. 734, § 96,) to appoint this portion of the testator's personal estate among his surviving children at her death; and that the trustee having died, leaving the power unexecuted, the court of chancery was bound to decree an execution of the power, in favor of all the surviving children of the testator equally; under the provisions of the 100th section of the article of the revised statutes relative to powers. He also decided that, as the power to the executors to sell the farm at the death of the widow was imperative, the persons beneficially interested in the execution thereof were entitled to the rents and profits of the farm, from the death of the widow until it was actually sold; and that in equity it must be considered as converted into personal estate from the time of the widow's death, although the legal title nominally passed by descent to the heirs at law of the testator, under the provisions of the revised statutes on that subject, until the actual execution of the power. The chancellor likewise held that the power in trust, to sell, extended to the whole of the testator's interest in the farm; and that the death of Letitia Mollan, without issue, did not render the power of sale as to her undivided two-sevenths of the farm void. But as the trust in relation to the proceeds of that part of the premises had failed, by her death without leaving issue, that portion of the proceeds of the sale, and two-sevenths of the rents and profits, subsequent to the death of the widow and before the actual conversion of the farm into personal estate, for the purposes of the will, was distributable immediately among all the heirs at law of the testator, or their representatives; as an interest in the real estate of the testator not legally and effectually disposed of by the will. A decretal order was accordingly made, for the dis-

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tribution of the plate and household furniture, or the proceeds thereof, and of the proceeds of the sale of the farm when received, and of the compensation for a part of the farm which had been taken, by the water commissioners, for the use of the Croton aqueduct. But that decretal order directed that the share of the proceeds belonging to John Clendining the younger should be taken, and retained by the administrator, and trustee, pursuant to the directions of the decree of the assistant vice chancellor of the first circuit in relation thereto; and subject to the further order of the chancellor, if any question should arise as to the distribution of the part of the proceeds thus retained.

The administrator and trustee of the estate of the testator having resigned his trusts, and Floyd Smith having been substituted in his place in those trusts, and as the complainant in this suit, Lord & Corbett gave him notice that they claimed to be entitled to receive from him one-fifth of two-sevenths of the proceeds of the Sharon farm, being John Clendining the younger's share thereof; and that their claim was founded upon their judgment against him, which they insisted was a prior lien upon the premises sold, and also upon their assignment of all his interest in his father's estate. The complainant thereupon presented this petition, asking the direction of the chancellor in the premises; and he gave notice of the application, not only to the solicitor of Lord & Corbett, but also to the several parties claiming interests in the estate of the testator, under the will, or otherwise. Lord & Corbett appeared before the chancellor, by their solicitor and counsel, upon the application, and produced an affidavit stating the recovery of their judgment, and the return of the execution unsatisfied, and the assignment to them, and also showing that in October, 1840, they filed a creditor's bill against John Clendining the younger, before the vice chancellor of the first circuit, founded upon such judgment, and the return of their execution unsatisfied; which suit was still pending. Under these proceedings Lord & Corbett claimed that they were entitled to one-sixth of two-sevenths of the proceeds of the farm, which would otherwise have belonged to John Clendining the younger, as one of the heirs at

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law of his father ; and to one-fifth of one other sixth of the same two-sevenths, which he would otherwise have been entitled to as one of the heirs at law of his deceased sister, Letitia Mollan. They claimed also that they were entitled to all the income of the estate, received by the administrator and trustee for the share of John Clendining the younger, after the assignment to them and before the making of the decree of the assistant vice chancellor ; that such decree was merely prospective, and referred only to the future income ; and that the former administrator and trustee, and the heirs at law of the testator, had recognized the rights of Lord & Corbett by consenting to the paying over to them of one-sixth of two-sevenths of the proceeds of the part of the farm taken by the water commissioners. Lord & Corbett were not parties to the suit before the chancellor ; but they stipulated in writing to abide by the order or decree of the chancellor, to be made upon the petition, with liberty to appeal therefrom if they thought proper to do so.

M. Hoffman, for the complainant, and for the surviving legatees and devisees of the testator, and for the administrator of the widow.

J. L. Mason, for the administrator of Margaret Bulkley deceased, and for her children.

E. H. Owen, for Lord & Corbett, the assignees.

THE CHANCELLOR. The funds in the hands of the trustee, and those which are hereafter to be received by him, consist of the following items: *First*, the income of one-seventh of the proceeds of the residuary real and personal estate of the testator, which was devised and bequeathed to the executors in trust for John Clendining, jun. for life. *Second* ; that portion of the two-sevenths of the personal estate of the decedent which was not legally and effectually disposed of by the will, upon the contingency which has actually occurred—the death of Letitia Mollan without leaving issue—which belonged to John Clen-

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dining, jun. as one of the next of kin of his father ; and a similar interest, which he will be entitled to, in the shares bequeathed to himself and other children of the testator for life with remainder to their issue respectively, in case he or any of such other children should die without leaving issue. *Third* ; the one-fifth of the proceeds of the plate and household furniture ; to which John Clendening the younger became entitled, under the power in trust to his mother to dispose of it among her children at her death. *Fourth* ; that portion of the two-sevenths of the proceeds of the testator's real estate which was not legally and effectually disposed of by the will, in consequence of the death of Mrs. Mollan without leaving issue, and which belonged to John Clendining the younger as one of the heirs at law of his father ; and a similar interest, to which he will be entitled as such heir, in the other five-sevenths of the proceeds of the real estate, or some part of those five-sevenths, in case he or any of the other children, to whom life interests were bequeathed, shall hereafter die without leaving issue. And *Fifth* ; his interest as one of the heirs at law of his sister, Mrs. Mollan, in her one-sixth of two-sevenths of the proceeds of the real estate which descended to her, as one of the six heirs at law of the testator, in the contingency of her leaving no issue to take the same under the provisions of the will ; and a similar interest, as one of her heirs at law, in her one-sixth of the other five-sevenths of the proceeds of such real estate, or in her sixth of some of those five-sevenths, which may ultimately appear to have descended to her, at the death of her father, as one of his children and heirs, in case John Clendining the younger, or any of the other children of the testator, to whom life estates are given by the will, shall hereafter die without leaving issue.

As to the first item, the decree of the assistant vice chancellor expressly directs it to be retained and applied to the payment of the debt due, from the devisee and legatee, to the estate. I think his decree is equally plain in reference to the second item of which the fund is now composed, or may hereafter be composed. And I do not understand the decree as making any distinction between income which had then come to the hands

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of the administrator and trustee, and that which should thereafter come to his hands. The whole amount of funds embraced in those two items, whether now in the hands of the complainant or hereafter to be received by him, must be applied in part satisfaction of the debt and costs due from John Clendining the younger to the estate of the testator; and Lord & Corbett are not entitled to any part thereof until that debt, and the costs, with the interest on the debt from the 17th of April, 1839, as mentioned in the decree of the assistant vice chancellor, are fully paid. (*See Ex parte Turpin, Mont. Bank. Rep. 443.*)

The only difficulty I have in relation to this part of the fund in controversy, is in properly apportioning it among those who are entitled to it under the will of the testator, or as his heirs at law and next of kin. And this difficulty would be still greater if there was a probability that, in any contingency, the retained fund would be sufficient to pay the whole debt due to the estate, with the interest thereon. Those who have present interests in the estate of the testator appear to have supposed that the whole retained fund was to be treated as income, and was to be distributed accordingly; and that John Clendining was to be laid entirely out of the case in making such distribution. As there is no probability, and perhaps I may say there is no possibility, that the share which the complainant will be entitled to retain under the decree of the assistant vice chancellor, or otherwise, will be sufficient to pay the debt which John Clendining the younger owes to the estate, he may be considered as out of the question so far as relates to his own interest. But his issue, if he should leave any at the time of his death, and the issue of James Clendining, Mrs. Hogan, and Mrs. Kearney, are interested in the distribution of the fund. And their rights as remaindermen, in five-sevenths of that portion of the fund which is to be deemed a part of the capital of the testator's estate, must be considered and provided for in the order of distribution.

So much of the debt of John Clendining, to his father, including the interest due at the time of the death of the latter, as can be collected by the administrator, must be considered and

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treated as a part of the capital of the testator's estate, and must be apportioned and distributed accordingly. If the whole amount of the debt and interest could be received, by such retainer of income, so much as had accrued for interest, since the death of the testator, would be properly distributable among those who had present interests in the personal estate; and the sum due at the death of the testator would all be considered and treated as a part of the capital of his personal estate. (*Melland v. Gray*, 2 *Coll. Ch. Rep.* 296.) But it would be inequitable, in reference to the rights of the testator's children, to whom he bequeathed life interests in his estate, to invest as capital, from the time it was retained, the whole amount which has been or may hereafter be received and retained on account of this very large debt, during the life of the debtor, for the benefit of the remaindermen. On the contrary, a proportionate part of the receipts, subsequent to the death of the testator, where the whole debt, with the interest which has accrued thereon after his death, cannot be collected, should be considered as interest accrued and received upon the capital of the estate; and should be paid over to those who are entitled to life interests in such capital. And the proper way to apportion partial payments, between the persons entitled to the life interests and the remaindermen, in such a case, is to consider as capital so much of the amount as will, with the legal interest thereon from the death of the testator, produce the whole sums collected and which are to be apportioned. Thus; if there is due to the estate, at the death of the testator, a debt of ten thousand dollars, and only \$1350 of that debt is collected, at the expiration of five years from his death, the executor should invest \$1000 of the amount collected as the capital of the estate, and pay over, to the owner of the life estate in the fund, the other \$350, as the interest on that capital for the five years; and should thereafter pay over to the owner of the life estate the subsequent income of the \$1000, so invested as capital.

In the case under consideration, the fund which is properly applicable to the payment of the debt of John Clendinning the younger, must be apportioned accordingly, between the owners

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of life estates, as income, and the shares of the remaindermen which are to be invested as capital; and the future income of such capital must be paid to those who are entitled to life estates therein. But inasmuch as the debtor himself will, in this apportionment, have a part of the past income assigned to him, as the owner of a life estate in one-seventh of the testator's personal property, that, as well as the future income of the capital of the portion of this fund which is to be set apart for his issue in case he shall leave any at his death, must again be retained by the complainant, on account of the debt, to be further apportioned; and so on until his interest therein is exhausted. The shares apportioned to the other owners of life estates, as income in the fund retained by the complainant and his predecessor, under the decree of the assistant vice chancellor, must be paid to them by the complainant according to the conditions of the will. And the capital belonging to the shares of James Clendining, Mrs. Hogan, and Mrs. Kearney, must be invested, and the income thereof paid to them for life.

The other two-sevenths which is apportioned between Stewart Mollan, as the representative of his deceased wife's interest for life therein, and the widow and next of kin of the testator, must be apportioned upon the same principle; but it must be made with reference to the time of Mrs. Mollan's death, so as to give her husband the income of the whole two-sevenths up to that time. And the capital of that two-sevenths, and the subsequent accumulations thereon, together with John Clendining's distributive share in two-thirds of such two-sevenths and the accumulations, must be apportioned and distributed and paid over as follows: one-third to the administrator of the testator's widow, as an interest in the personal estate of her deceased husband not disposed of by the will; one-fifth of two-thirds to Stewart Mollan, as the representative of his deceased wife; one fifth to the administrator of Mrs. Bulkley; and one-fifth to each of the other three surviving children of the testator, James Clendining, Mrs. Hogan, and Mrs. Kearney. In other words; in making the distribution, every thing that is retained towards John Clendining the younger's debt must, in

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such distribution, be distributed among the legatees and the widow and next of kin of the testator, and those who may be their representatives from time to time, except John, in the same manner, or rather so as to produce the same effect, as if the fund had been received and retained by the administrator with the will annexed immediately after the death of the testator. For the legatees and widow and next of kin had a vested interest in the debt at that time; although the contingency, upon the happening of which that interest was to vest in possession, did not occur until some of them were dead. The costs of the complainant, upon this application, and all the costs and expenses which may hereafter be incurred by him in procuring an apportionment of the fund, or in any future litigation in reference thereto and which are properly chargeable against the estate generally, must be charged upon the personal property of the testator not validly and effectually disposed of by the will, which arises from the share of John Clendining the younger in the estate, and which is retained by the administrator and trustee for his debt. And such costs and expenses must first be deducted, before distribution is made between the widow and next of kin of the testator, or their representatives. If any other sums have heretofore been properly retained by the administrator and trustee, or shall hereafter be so retained by him, on account of this debt of John Clendining the younger, out of his share of his father's estate, or otherwise, they are to be apportioned, invested, and distributed in the same manner, or upon the same principles as above stated in reference to the sums which have already been retained, under and in conformity to the decree of the assistant vice chancellor; after deducting the costs and necessary expenses from that part of the debt, to the estate, which is not legally and effectually disposed of by the will.

The interest of John Clendining the younger, in his mother's third of the personal property of the testator which is not disposed of by the will, does not belong to the complainant under the decree of the assistant vice chancellor; nor is he authorized to retain that share of the fund, as there are no mutual claims,

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between him and the debtor of the estate which he represents, in relation to the widow's distributive share. That share belongs to the personal representative of the widow; and John Clendining, the younger, has no right to bring a suit against the complainant, either at law or in equity, to recover his proportion of that share, to which he may be entitled as one of her next of kin. Neither are Lord & Corbett entitled to that interest, of their judgment debtor, in his mother's distributive share of his father's estate. It was not embraced in his assignment to them, nor did it in fact exist, either at that time or when they filed their creditor's bill against him, in October, 1840. For his mother was then living, and he had no interest in her estate, either vested or contingent. His chance of becoming thereafter entitled, as one of her next of kin, was a bare possibility unaccompanied by any interest. It could not therefore be reached by a creditor's bill at that time. And the only way it can now be obtained, either by these judgment creditors or by the complainant in this cause, except through a voluntary assignment thereof by John Clendining the younger, is to file a creditor's bill, to reach this interest in his mother's share of the debt due from him to his father's estate; and which is being paid from time to time to the personal representative of the mother, out of his share of the last mentioned estate. I have therefore directed the whole of the widow's third of the fund in question to be paid over to her administrator; who is the only person authorized to receive the same and to give the complainant a proper discharge therefor. And it will be his duty to receive it and distribute it among those who are legally entitled thereto. Or if he wishes to avoid that trouble, he can give the complainant an order to pay over the same to those who are entitled to share in her estate according to their respective rights and interests therein.

The one-fifth of the proceeds of the plate and household furniture, to which John Clendining the younger was entitled, under the power of appointment contained in the will, as one of the five surviving children of the testator, the administrator was entitled to retain; not only by virtue of the decree of the

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assistant vice chancellor, but also independent of that decree. The decree declares that the complainant is authorized to retain all and singular the portion which in and by the last will and testament of John Clendining, deceased, was given and bequeathed to John Clendining, one of the defendants in that suit. This part of the decree embraces what was given to the latter, by the will, under the power of appointment; whether that power was in fact executed, or the whole was distributed among all of the class beneficially interested in the fund to which the power in trust related, under the provisions of the statute, in consequence of the death of the trustee of the power without having executed the trust. In either case, it was a part of the fund given and bequeathed to the party entitled to it; and not a part of the testator's estate which was not validly and effectually disposed of by the will.

Again; the right of the executor or administrator to retain the whole, or a part, of a legacy or distributive share, in discharge or satisfaction of a debt due from the legatee or distributee to the estate, is not only consistent with the soundest principles of equity, but is perfectly well settled. Thus, in the case of *Jeff v. Wood*, (2 P. Wms. Rep. 128,) which came before Sir Joseph Jekyll in 1723, he decided that the executor was entitled to retain a legacy, as against the assignees in bankruptcy of the legatee, in satisfaction of a debt due from the legatee to the estate of the testator. In *Sims v. Doughty*, (5 Ves. 243,) Lord Alvanly allowed a retainer by the surviving executor, as against the representatives of a deceased executor who was a legatee, but who had wasted a part of the estate. In the case of *Lady Elibank v. Montelieu*, (*Idem*, 737,) the administrator was not allowed to retain a debt due to the intestate, from the husband of one of the next of kin. But that decision was put upon the ground that the debtor of the testator and the person entitled to the distributive share of the estate were not the same, and that the wife's equity in her distributive share must first be protected. Even in that case, however, the reference to the master was made upon the principle that the administrator was entitled to retain for so much of the distributive

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share as was, at law, due to the husband, after making a suitable provision for the wife and her children out of the same. The decree of Sir William Grant, in *Carr v. Taylor*, (10 Ves. Rep. 574,) was made upon the same principle; and the assignees of the husband were required to make a proposal for an adequate allowance out of the wife's distributive share to satisfy her equity. And in the *Matter of Gordon*, (1 Glyn & Jam. Rep. 347,) Sir John Leach decided that the executor was entitled to retain, as against the assignees of the husband, the interest of the husband in a legacy to his wife, in satisfaction of a debt due to the testator; after providing for the wife's equity. In *Rankin v. Barnard*, (5 Mad. Rep. 32,) that same distinguished equity judge decided in favor of the right of the executors to retain for a debt due from the husband of the legatee, as against the assignees in bankruptcy of the husband; the wife being dead. He says, "A legacy to the wife is at law a legacy to the husband, but in equity it is subject to a claim of the wife to a provision out of it for herself and children. This lady has died without asserting such a claim; and the legacy being discharged of her equity would have become the absolute property of the husband if there had been no bankruptcy. It is clear that as against the husband, the executors of the testatrix would have had a right to satisfy the legacy by writing off so much of the debt due from the husband to the estate of the testatrix; and they must have the same right against the assignees of the husband." That this is not a mere question of legal offset, but of equitable lien and right of retainer, was settled by Sir James Wigram in the recent case of *Courtenay v. Williams*, (3 Hare's Ch. Rep. 539.) If the share of John Clendinning the younger in the proceeds of the plate and household furniture, has been retained by the administrator on account of the debt due to the estate, it must be apportioned and distributed among the legatees for life and the remaindermen, and the widow and next of kin of the testator, or their representatives, as above directed.

The next question to be considered is, as to the right of the administrator and trustee to retain out of the fourth item of the fund in controversy, as above specified. The rights of the re

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spective claimants to this part of the fund in the hands of the complainant, are in no way affected by the decree of the assistant vice chancellor. For that decree neither authorizes the administrator and trustee to retain it, for the debt due to the estate, nor directs him to pay it to Lord & Corbett, as the assignees of John Clendining the younger's interest in it. Nor was there enough of the will set out in the bill, in that case, to raise any question as to this part of the fund. The rights of the parties must therefore be disposed of here, without reference to that decree; which decree I think was right as to all the questions which appear to have been disposed of by it.

In the cases which I have been considering, except in a few which were mere questions of legal or equitable set-off, the right to retain depended upon the principle that the legatee or distributee was not entitled to his legacy, or distributive share, while he retained in his own hands a part of the fund out of which that and other legacies; or distributive shares, ought to be paid, or which were necessary to extinguish other claims on that fund. In other words, the legatee or distributee, in such cases, seeks to obtain a portion of the fund which the testator, or the letters of administration, have placed in the hands of the executor or administrator to pay debts and legacies, or distributive shares; while such legatee or distributee is himself a debtor to the estate, and by withholding payment, diminishes the fund to that extent. And it is against conscience that he should receive any thing out of the fund without deducting therefrom the amount of that fund which is already in his hands, as a debtor to the estate. The assignees of the legatee, or distributee, in such a case, take his legacy or distributive share subject to this equity, which existed against it in his hands. But in relation to the proceeds of that portion of the real estate which descended to John Clendining the younger, as one of the heirs at law of the father, this principle of equitable retainer does not apply. That fund was not placed in the hands of the executors, by the will of the testator, as personal estate, but its conversion was merely accidental; because the valid portions of the will of the testator could not be carried into effect in any

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other way than by a sale of the whole farm. It is, in equity, therefore, still to be considered as real estate, and as in no way connected with the fund which came to the hands of the complainant for the purposes of the will; of which last mentioned fund the real estate equitably converted, and the whole personal estate, including the debt of John Clendining the younger, formed a part. Indeed the real estate which descended to the testator's son John, as one of the heirs at law, was not in fact converted at the time of the assignment thereof to Lord & Corbett, in May, 1838. The proceeds of the subsequent sale of this particular interest in the testator's real estate, therefore, did not come into the hands of the administrator and trustee, in trust for the debtor of the estate; but in trust for Lord & Corbett. Had it continued the property of the debtor of the estate until after the fund arising from the sale came into the hands of the executor and trustee by operation of law, for the benefit of such debtor, a question of equitable set-off, founded upon the insolvency of the latter, might have arisen; which it is not necessary now to discuss. Upon the ground that the fund was received for the benefit of Lord & Corbett as the *cestuis que* trust, they are entitled to have it paid over to them.

The remaining item of the fund in controversy arises from the sale of the interest of John Clendining the younger, in one-fifth of that part of the real estate of the testator which, in the event that has happened, and in those which may hereafter occur, descended to Mrs. Mollan, as one of the six heirs of her father who were in esse at the time of his death. That interest did not come to John Clendining under the will of his father, and the complainant, therefore, has no equitable lien on it, for the reasons before stated. Nor did it come to him as one of the heirs at law of his father, but descended to him as one of the five heirs at law of his sister, Mrs. Mollan; his mother's life interest therein having terminated by her death, before the sale. It would not, therefore, have passed to Lord & Corbett, by the terms of his assignment to them, even if it had descended to him before the date of that assignment; which it did not. But I think they have an equitable lien upon this part of the

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proceeds of the sale, by the docketing of their judgment, in 1837. Upon the death of Mrs. Mollan, which was before the sale, the legal title to this share of the real estate became vested in the judgment debtor; and the lien of the judgment attached upon that legal title. And as the real estate of the testator which was not validly and effectually disposed of by his will, is not considered, in equity, as converted by the subsequent sale under the trust power, I think John Clendining, as one of the heirs of his sister, had an interest in that real estate, which was a proper subject of sale on execution, upon the judgment of Lord & Corbett, if such sale had taken place before the legal title of the judgment debtor had been divested by the execution of the power in trust. (2 R. S. 359, § 3.) And if such a sale had taken place, the purchaser would have been substituted in the stead of the judgment debtor, as to his part of the proceeds of the subsequent sale under the trust power; which proceeds, in equity, would not be considered as converted into personal estate. If so, the divesting of the legal lien of the judgment, in this case by the sale of the land under the power in trust contained in the will, only changed the legal lien of the judgment upon a portion of the land, to an equitable lien upon the same portion of the proceeds of that sale. Lord & Corbett are therefore entitled to that part of the fund in question.

An order must be entered with the clerk of the city and county of New-York, declaring the rights of the parties accordingly, and directing the complainant to distribute the fund which has already accrued, or which hereafter may accrue, in conformity therewith. If the parties cannot agree as to the proper apportionment and division of the fund, it must be settled by a master, to be named in the order, or by a referee to be hereafter designated by one of the justices of the supreme court.

PENTZ vs. HAWLEY and others.

In what cases it is proper for several defendants, who appear by the *same* solicitor, to put in separate answers.

A charge for attending to oppose a motion, pursuant to a notice from the adverse party, is allowable, on the taxation of costs, although the motion was not heard at the term for which it was noticed; provided it was put over upon the application of the party giving such notice. *Abiter* where the hearing of a motion is postponed to another term upon the application of the opposing party.

It is not a proper ground for granting a retaxation of costs, in behalf of a party who has appeared and opposed particular items in the bill, that the taxing officer has, by inadvertence, erroneously allowed an item which was not objected to before him.

The party applying for a retaxation of costs will be charged with the costs of opposing his application, where he does not succeed in obtaining a retaxation as to any one of the items objected to before the taxing officer.

But the court will not permit a party to retain, in his bill, charges which are clearly improper to be retained; although no objection was made to them before the taxing officer.

THIS was an application, by the complainant, for the retaxation of the costs of the seven defendants in this cause who appeared by J. Powers, as their solicitor. The questions presented upon the application are fully stated in the chancellor's opinion.

J. Rhoades, for the complainant.

J. Van Vleck, for the defendants.

THE CHANCELLOR. The principal objection to the bill as taxed, is that the taxing officer has allowed the expense of four answers, in part, when, as it is insisted by the complainant's counsel, all the defendants who appeared by the same solicitor should have joined in one answer. The subpoenas were probably served upon the several defendants at different times. For Schuneman appeared, and an order to answer was served upon his solicitor, about the middle of August; but the appearances of the other defendants were not entered until on or after the 20th of September. And the affidavit of the solicitor states

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that the separate answer of Schuneman was prepared before such solicitor was retained by the other defendants, and before he knew what their defences were. As the answer was not actually sworn to and filed until after the solicitor was retained by the other defendants, he might, perhaps, have gotten the time allowed for Schuneman to answer extended, by an application to the court or to a vice chancellor, upon an affidavit of the fact that the defences of his other clients were the same and that he wished to save the expense of separate answers. But as the complainant was pressing on the suit against the first defendant, without waiting to see whether the other defendants would appear in the cause, and the time for answering had nearly expired when the other defendants appeared, I think the solicitor of the defendants was not bound to put his client Schuneman to the expense of such an order, or to alter his answer which had already been prepared for filing within the forty days allowed for that purpose. Nor was he bound to commit his other clients to the same defence, when they might have conflicting rights with the defendant Schuneman, without giving them a reasonable time to ascertain that fact. It turned out afterwards, that the defendants Green and Blackman set up defences which rendered it proper for them to put in answers different from that of Schuneman, and in some respects materially different from each other.

As I understand it, the bill was filed to compel all the defendants, who were alleged to be stockholders of the bankrupt rail-road company, to contribute ratably to the debts of the corporation, according to the number of shares held by each, as stated in the complainant's bill. If the complainant had succeeded, therefore, Schuneman and the two Abells and the two Lockies would have had a common interest with the complainant in maintaining that Green was a stockholder to the amount of the fifty shares, as stated in the bill, and that Blackman was also a stockholder of the company. On the contrary, Green was interested in reducing the amount of his stock to the twenty shares stated in his answer; but he had a common interest with the complainant, and the other defendants, except

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Blackman and the receiver, in sustaining the allegation in the bill that Blackman was a stockholder, and was liable to contribute as such. The five first named defendants, for whom Powers appeared, could not reasonably be required to join in answers which, if the facts stated therein should be sustained by proofs, would increase the amount of contributions for which those five defendants would be liable. Nor could Green, who admitted himself to be a stockholder to the amount of the twenty shares held in trust for him by Cornall and others, be reasonably required to join in the answer of Blackman; who denied his liability as a stockholder altogether, upon the alleged ground that the whole capital stock of the company had been taken up by others at the time when he became a subscriber, and that his subscription was therefore a nullity. For these reasons, I think the solicitor of these seven defendants was entitled to charge for that portion of the four answers which has been allowed by the taxing officer.

Both charges for attending to oppose the special motion, of which notice had been given by the adverse party for the first day of the general term, and which was finally put over until the next special term upon the application of the complainant's counsel, appear to have been properly allowed. The case would have been different if the hearing of the matter had been postponed to another motion day upon the application of the counsel for the defendants, for his or their accommodation. (*Frost v. Frost*, 1 Barb. Ch. Rep. 492.)

The taxing officer properly disallowed the charges for abbreviating the schedules to the answers, so far as they were objected to, as not properly taxable, under the fee bill. But as the objection was not made in reference to the answer of Schuneman, and the charge for abbreviating that answer did not show that it included the abbreviation of the schedule, it was overlooked by the taxing officer. It now appears, however, that the schedule was included in the 127 folios, for the abbreviating of which the charge was made. So that the bill of the solicitor for the defendants, as taxed, was in fact about \$1 too much.

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It is not a proper ground for a retaxation, however, in behalf of a party who has appeared and opposed particular items in a bill of costs, that the taxing officer has, by inadvertence, allowed an item which was not objected to. The party applying for a retaxation, therefore, should pay the costs of opposing his application, if he does not succeed in obtaining a retaxation as to some one of the items objected to before the taxing officer. But the court will not permit the adverse party to retain, in his bill, charges which are clearly improper to be retained; although no objection was made to them upon the taxation. The \$1,05 allowed for the abbreviating of the schedule annexed to Schuneman's answer, must therefore be disallowed. The shorter way to disallow it, however, is to deduct it from the \$15, to which the defendant's solicitor is entitled for opposing this application.

The form of the order, therefore, will be that the motion for retaxation in this suit be denied with \$13,95 costs. And a similar order is to be entered in the suit of Frederick Pentz against the same defendants.

DE RUYTER vs. THE TRUSTEES OF ST. PETER'S CHURCH,
and others.

Where a person who has an equitable interest in a building erected upon premises belonging to another, by having advanced money for the erection thereof, is in possession of the premises, under an agreement with the owner, at the time of the execution of a mortgage thereon to a third person, and continues in possession down to the time of the sale of the premises, by a master, under a decree obtained in a suit brought to foreclose such mortgage, the complainant in the foreclosure suit, and the purchaser at the master's sale, are bound to take notice of the equitable rights of the tenant, if any such exist; such possession being constructive notice to them of his rights.

The equitable claim of the person in possession, under such circumstances, will not be cut off by the foreclosure of the mortgage, and the sale of the premises, unless he was made a party to the foreclosure suit. And he may still enforce such claim

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against the mortgaged premises in the hands of the purchaser at the master's sale.

Where it does not appear that a person who was in possession of mortgaged premises claiming to have an equitable interest therein, prior to the mortgage, was a party to a suit brought to foreclose such mortgage, the purchaser at the master's sale will be presumed to have bid upon the property with reference to such claim of the tenant in possession; and it will be presumed that the amount of the proceeds of the sale were diminished pro tanto.

Accordingly, the tenant will have no claim upon the surplus moneys arising from the sale of the mortgaged premises, under the decree of foreclosure; such proceeds not having been produced by a sale of the equitable interest of the tenant in the premises.

Whether a parol agreement, made by the trustees of an incorporated religious society, with an individual, for the right to use the real estate of the corporation, and an advancement of money for the erection of buildings on such real estate, and the taking possession of the premises pursuant to such agreement, will give to such person an equitable interest in the permanent use and possession of the premises, without rent? *Quære.*

Where a person has an equitable lien upon the surplus moneys, arising from the sale of mortgaged premises under a decree of foreclosure, his proper course is to deliver notice of his claim to the master who makes the sale, or to file it with the clerk in whose office the surplus moneys are deposited by the master. Or in case an order of reference has been entered, upon the application of some other claimant, before he is aware of his rights, he should then go before the master, upon the reference, and present and establish his claim there. And where he neglects to do so, without any excuse, the court will not settle his right to such surplus moneys, upon petition.

THIS was an appeal, by the petitioner Mary Ann Ely, from an order of the vice chancellor of the first circuit, denying the appellant's petition with costs. The petitioner stated, among other things, that she was one of the members of a religious society devoted to the education and amelioration of the condition of the children of poor and indigent parents; that about five years before the giving of the mortgage upon the house and lot in Barclay-street, in the city of New-York, to the complainant in this cause, the trustees of St. Peter's church, a religious corporation which then was the owner of the lot, represented to her that the building which the corporation was about to erect upon the lot was to be used as a school house for poor children; and that it might be occupied as such by her, or any other member of the society to which she belonged, who

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was willing to occupy the same as a school house ; that, in consequence of such representations, she advanced to the treasurer of the corporation \$3750, to assist in the erection of the said house ; that the moneys so advanced by her were received and accepted by the trustees, under an agreement or understanding that the house was to be used and occupied by her, and other members of the society to which she belonged, for the purposes of a school ; and that the moneys so advanced by her were actually applied and expended, by the trustees, in the erection and completion of such school house. The petitioner further stated that upon the completion of the house, possession thereof was delivered to her, to be used by her and her associates for the purpose of a school, and that she so used the same, pursuant to her agreement with the trustees, up to the time of the sale thereof under the decree of foreclosure in this cause ; that upon the sale the premises produced a surplus of about \$2500 ; that the corporation had become insolvent, and, previous to the master's sale, had made an assignment of all its property to trustees for the payment of its debts ; and that the assignees, and Eliza Gallagher, Alice Lalor and others, who were judgment creditors of the corporation, had filed their claims to the surplus moneys. She therefore prayed for an order directing the payment of the surplus moneys to her, or for such other relief in the premises as she might be entitled to. The plaintiffs in the two judgments, who were named in the petition, had notice of the presentation thereof, and appeared by their counsel and put in affidavits stating their claims to the surplus moneys, as judgment creditors of the corporation. They also showed that at the time the petition was sworn to, no proceedings had taken place before the master ; so that the petitioner might have come in and proved her lien before him, if she had in reality any valid claim to the surplus moneys.

J. E. Develin, for the appellant.

L. Livingston, for the respondents.

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THE CHANCELLOR. The equitable interest of the appellant, in the property sold under the decree in this cause, if she had any, was prior to the execution of the complainant's mortgage. And as her petition states that she was in possession of the premises at that time, under her agreement with the trustees of the corporation, and down to the time of the sale by the master, the complainant and the purchaser at the master's sale were bound to take notice of her equitable rights, if any such existed; such possession being constructive notice to them. (*Chesterman v. Gardner*, 5 *John. Ch. Rep.* 29. *Grimstone v. Carter*, 3 *Paige's Rep.* 421. *Gouverneur v. Lynch*, 2 *Idem*, 300. *Brown v. Anderson*, 1 *Monro's Rep.* 201. *Tuttle v. Jackson*, 6 *Wend. Rep.* 226, and cases there cited.) Her equitable claim upon the property, therefore, was not cut off by the foreclosure and sale, unless she was made a party to the foreclosure suit; and she may still enforce it against the house and lot, in the hands of the purchaser, who bought the same at the master's sale with constructive notice of all the equitable rights which her advance of the \$3750, and the taking possession of the premises under the alleged agreement with the trustees of the corporation, gave her. It does not appear by the petition, or otherwise, that the appellant was a party to the foreclosure suit. The purchaser, therefore, must be presumed to have bid upon the property with reference to her claim to an equitable interest therein prior to the giving of the mortgage, and at the time of the sale, and that the amount of the proceeds of the sale was diminished pro tanto. For this reason she has no claim upon these surplus moneys; which have not been produced by the sale of her equitable interest in the premises. It is not necessary, therefore, to inquire whether a parol agreement with the trustees, and the advancement of her money and taking possession pursuant to such agreement, could give her an equitable interest in the permanent use and possession of real estate, without rent, where the trustees with whom she dealt could not themselves sell their interest in the estate without a previous order of the chancellor. (*Laws of 1817*, p. 241, § 1.)

Again; if the complainant had any equitable lien upon the

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surplus moneys in this case, which I think she had not, her proper course, under the rule of this court, was to deliver the notice of her claim to the master who made the sale, or to file it with the clerk in whose office the surplus moneys were deposited by the master. Or, in case an order of reference had been entered, upon the application of some other claimant, before she was aware of her rights, she still was authorized to go before the master, upon the reference, and to present and establish her claim there. (*Hulbert v. McKay*, 8 *Paige's Rep.* 654.) That course was still open to her when the petition in this cause was sworn to; and no reason is stated in her petition for subjecting the other claimants to the expense of coming here to oppose her application for the surplus moneys, upon affidavits. The vice chancellor, therefore, upon being satisfied that the petitioner had no equitable lien upon the surplus moneys, might very properly have charged her with those expenses.

The order appealed from must be affirmed, with costs.

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Under the provisions of the revised statutes, there is no implied covenant for the payment of a debt which is secured by mortgage upon real estate. On the contrary, the statute declares that where there is no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment has been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.

No covenant can now be implied in any conveyance, of real estate, which has been executed since the revised statutes, whether such conveyance contains special covenants or not.

Where a mortgage is taken for the security of a pre-existing indebtedness, without any intention of discharging the original debtor from personal responsibility upon his former security, his liability upon that security will remain, notwithstanding the debt is further secured by such mortgage. But if the original indebtedness is intended to be discharged, and a mere mortgage is taken, to secure the amount of the debt, without any express covenant to pay the same, and no bond or separate instrument is given to secure such payment, the mortgagee has no remedy upon any

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implied agreement of the mortgagor to pay the amount secured by the mortgage; but he must resort to the land alone, or to the proceeds thereof, for payment. The result is the same where an absolute deed is taken, as a mere security for the repayment of the amount of the consideration of such deed, instead of an ordinary mortgage; and where there is no covenant or other instrument rendering any one personally liable for the debt intended to be secured by such absolute deed.

THIS was an appeal from a decree of the vice chancellor of the sixth circuit. In February, 1837, Brown & Hone, of the city of New-York, had a judgment against J. L. Fisher, of Tioga county, for about \$3000, besides interest and costs, and had filed a creditor's bill thereon. A negotiation was thereupon commenced by G. Fisher, the father of the debtor, for the compromise of the claim. This negotiation was conducted through Strong & Taylor, the attorneys of Brown & Hone at Owego, and resulted in the accepting a proposition of G. Fisher, that the latter should pay all the costs of the proceedings and one-half of the debt and interest; one-third on the 1st of May, 1837 and the residue in two semi-annual payments from that date and that he should have an assignment of the claim against his son, so as to give him the benefit of the judgment and of the creditor's suit which had been commenced to obtain satisfaction of the debt. The negotiation was protracted to such a length that the 1st of May arrived before G. Fisher had paid the costs, and completed the arrangement by giving his notes for the debt and interest. And being then confined at home by sickness, he sent his son-in-law, P. Whitmore, to Owego, to complete the arrangement with the attorneys of Brown & Hone. And to enable him to do so, G. Fisher signed two notes, in blank as to the amount, to be filled up each with one-third of the amount of the debt and interest, payable at six and twelve months. But as he had not the money to pay the other third of the debt and interest, he authorized Whitmore, who was then his copartner in business, to make the best arrangement he could as to that portion. The attorneys finally consented to accept the note of the firm of Fisher & Whitmore, payable in sixty days, for the third of the debt and interest which was to have been paid on the 1st of

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May; and the notes were filled up and delivered accordingly. And Strong & Taylor gave a receipt, at the foot of a statement of the judgment and of the amount thereof, specifying that they had received the three notes of G. Fisher, which notes, when paid, would be in full of such judgment.

The notes were sent to Brown & Hone, who ratified the final arrangement which had been made by their attorneys, but no part of either of the notes was paid as they respectively became due; the firm of Fisher & Whitmore, as well as G. Fisher individually, having become somewhat embarrassed as to their money matters. After the second note had become due, and had been protested for non-payment, Whitmore, in the name of his firm, wrote to Hepburn, his friend in New-York, to call upon Brown & Hone and endeavor to obtain an extension of time, to prevent suits being commenced upon the notes; and proposed, through him, that if the time of payment could be extended to September, 1838, the firm would give a house and lot, which was the individual property of Whitmore, as security; and would pay the debt as much sooner as possible. Several interviews took place between Hepburn and Brown & Hone on the subject, which were communicated to Whitmore; but no arrangement was made between the parties. In May, 1838, Whitmore went to New-York to see Brown & Hone, and an interview took place between him and them, or with Brown, one of the members of that firm, which resulted in an arrangement by which Whitmore and wife conveyed the house and lot to Brown & Hone, by an absolute deed, with warranty, subject to a previous mortgage thereon for about \$500. The consideration expressed in this deed was the amount of the three notes and the interest thereon to September, 1838, including the expenses of protest, &c. And the grantees in the deed gave back to Whitmore a written agreement, reciting the execution of the deed and the amount of the consideration thereof, and whereby Brown & Hone promised and agreed with Whitmore that they would release and reconvey the house and lot to him, by a good and sufficient deed of conveyance, subject to the \$500 mortgage thereon, if he or his assigns should well and truly pay

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to them by the first of September, 1838, the sum of \$1726,73, the amount of consideration expressed in the deed. Whitmore also assigned to them, for their own use, a policy of insurance upon the house, and took from them an assignment of their judgment against J. L. Fisher. The three notes were also delivered up to Whitmore; Brown having first made a memorandum upon each, signed by him with the name of his firm, stating that it was settled. An account current was also made out in favor of Brown & Hone, against the firm of Fisher & Whitmore, in which account the latter firm was charged with the amount of the three notes, the interest thereon to September, 1838, and the expenses of protest, &c.; amounting to the same sum mentioned in the deed as the consideration. And at the foot of this account, which was also delivered to Whitmore, there was a receipt as follows: "Rec'd in settlement, Brown & Hone." After this arrangement had been completed, and before the first of September, 1838, Brown & Hone, having become embarrassed, made a general and absolute assignment of all their merchandise, debts, and claims of every description, and all their property real and personal, to the complainant for his own benefit; he having assumed the payment of the debts of the firm. Whitmore did not deliver up the possession of the house and lot to Brown & Hone, at the time of the execution of the deed, nor to the complainant, as their assignee, on or after September, 1838; but continued to reside in the house and to occupy the lot at the time the testimony was taken in this cause. He had, however, offered to one of the members of the firm of Brown & Hone, about the last of the year 1838, to deliver the possession to him when he should be requested to do so.

In August, 1839, the complainant filed his bill in this cause, against Whitmore and his wife and G. Fisher, stating among other things, that the house and lot were conveyed to Brown & Hone, to secure the payment of the amount due upon the three notes; that it was understood by the parties that the conveyance was to be a collateral security for the debt, and that the agreement to reconvey was given in pursuance of such understanding; and that the defendant Whitmore had continued

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to possess the premises, and to enjoy the rents, issues and profits thereof. And the complainant prayed for a foreclosure and sale of the premises, for the payment of the debt and costs, and that the defendants G. Fisher and P. Whitmore might be decreed to pay the deficiency; or that he might have such other relief as might be equitable and proper. The defendants, by their answer upon oath—P. Whitmore positively, and his wife and her father upon information and belief—averred that the house and lot were conveyed to Brown & Hone under an agreement that such conveyance should be in full satisfaction and discharge of the notes; but that Whitmore should have a writing entitling him to a reconveyance if he repaid the amount of the consideration money on or before the first of September, 1838. And that he was to surrender the premises to them on that day, if he did not pay the amount of the consideration money expressed in the deed, so as to entitle him to a reconveyance. The cause was heard upon pleadings and proofs, before the vice chancellor; who decided that the conveyance was a mortgage, and that the defendants G. Fisher and Whitmore were both liable for the deficiency, if any, upon a sale of the premises. He therefore made the usual decree for a foreclosure and sale, and a decree over against them jointly for the deficiency. From that decree the defendants appealed to the chancellor.

J. J. Taylor, for the appellants. Whitmore had no interest in, and was no way connected with, the settlement of the claim of Brown & Hone against G. L. Fisher. Whatever he did in the matter, which was very little, was simply as the agent of his partner and father in law, George Fisher, who was then sick. This appears from the answer, and from the testimony of G. L. Fisher and Taylor, and the correspondence between Brown & Hone and Strong & Taylor, and between George Fisher and Strong & Taylor. The indebtedness which grew out of that settlement was therefore really the indebtedness of George Fisher alone. And Whitmore was not even surety *except* as to one-third of the amount.

The conveyance by Whitmore and wife to Brown & Hone

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and the covenant from them to Whitmore, did not constitute a mortgage, but they were an absolute deed and a covenant to reconvey on certain conditions. The deed is absolute on its face, and is a warranty deed, and was always treated as an absolute deed by all parties, being recorded and held as such, and is expressly subject to a mortgage and certain reservations. The notes were, at the time of the conveyance, endorsed "Settled—Brown & Hone;" and were delivered up, and nothing was taken in their place. The amount due thereon was acknowledged to have been "received in the settlement." The policy of insurance upon the buildings was assigned absolutely to the grantees, and the judgment against G. L. Fisher, out of which the indebtedness grew, was assigned absolutely to Whitmore. The agreement to reconvey is not in the form and language of a defeasance, but of a contract to convey upon payment of a sum of money. There is no remedy given in it, or elsewhere, for the payment of any surplus or any deficiency upon a sale of the premises. And after the conveyance there was no indebtedness remaining from Fisher & Whitmore, or either of them, to Brown & Hone. Whitmore, who gave the deed, never had been indebted to Brown & Hone; at least no further than as surety for George Fisher, and that only to one-third of the whole amount of the consideration for the conveyance. Consequently there never had been a pre-existing debt of the grantor. And all the indebtedness, as well of George Fisher as of Fisher & Whitmore, was extinguished at the time of the conveyance. This appears not only from the papers made exhibits in this cause, and to which I have before referred, but also from the bill and answer and the proofs. Brown, it is true, speaks indefinitely of assurances that the money should be paid on or before the first of September. But even if any such assurances were given, they may as well be understood as relating to Whitmore's first proposition—to give a mortgage—which was rejected, as to his second offer to give an absolute deed; which offer was accepted. Such assurances cannot be relied upon as promises to pay, which are binding; for no such promises are stated in the complainant's bill. They do not amount to an

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agreement, as Brown states them ; and besides, being promises to pay the debt of a third person, they would be void by the statute of frauds.

The price given was not disproportioned to the actual value of the land. It was worth a little less, rather than more, than was given. It is where it is worth much more, that a presumption that a mortgage was intended is raised. No good reason has been assigned, nor can be, why this form of transacting the business was adopted, if the intention of the parties was to make it a mortgage. It appears from the answer, which is responsive to the bill, and from the proofs, that a mortgage was not intended. Even Brown's testimony, viewed in all its parts, leads to that conclusion.

But even if we concede that the conveyance, taken in connection with the agreement to reconvey and all the attendant circumstances, is a mortgage, it certainly cannot be contended that there is an express covenant for the payment of any money contained in the mortgage, including the agreement to reconvey, or that any bond or other separate instrument to secure such payment has been given. By the statute, therefore, the remedies of the mortgagee are to be confined to the lands mentioned in the mortgage. And this must apply as well to costs as to debt. Such instruments as had before existed to secure the payment, were given up and cancelled at the time of the conveyance. There was no fraud in the arrangement made by Whitmore with Brown & Hone, in May and June, 1838. The answer expressly denies fraud, and the proofs confirm the denial. And the most that Brown pretends is, that he gathered from Whitmore's conversation that the property conveyed to Brown & Hone was worth much more than it was. And he admits that every opportunity was given them to learn its value ; that various references were given them ; and that it was not upon Whitmore's statement that they purchased, but upon information derived from other sources. He even says, the whole matter was concluded upon before they saw Whitmore. The matter was in contemplation some weeks, or rather months, before it was finally consummated ; and there is no pretence that

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any measures were adopted to prevent or in any manner influence Brown & Hone from making every examination and inquiry in reference to the property and its value. There could have been no fraud in the sale of the property by Whitmore to Brown & Hone; for all that is pretended is an erroneous estimate of its value. And even the value turns out by the testimony of witnesses to have been but little if any below the price paid. Be it ever so erroneous, the mere expression of an opinion as to the value of property, whether real or personal, where there is no concealment or misrepresentation of facts, can never render the sale fraudulent. In this case every material fact was freely and voluntarily disclosed.

The complainant's bill should therefore be dismissed with costs. Even if the conveyance should be deemed a mortgage, the complainant's remedies are confined to the lands mortgaged; and having claimed a decree for the deficiency on the sale, and having been offered, before suit brought, all he can have, he must, for either of these reasons, pay costs to the defendants.

J. M. Parker, for the respondent, The conveyance from Whitmore and wife to Brown & Hone, was a mortgage; as appears clearly from the whole case. The answer denies this, so that we must make it out by more than the testimony of a single witness. This we contend we have done. Brown fully contradicts the answer, and sustains the bill on this point. Besides, the answer being contradicted by the other testimony, in some other particulars, as will presently appear, is entitled to diminished weight—at least, we may set off Brown against the answer. And let us then see what is the testimony bearing upon this point, aside from those two. We have the evidence arising from the papers themselves, to wit, the deed and the contract to re-convey. These together constitute a mortgage, and would be so held without any more evidence than the bare production of them. (*Parson's Com.* 178. *Kelleran v. Brown*, 4 *Mass. Rep.* 449. *Erskine v. Townsend*, 2 *Id.* 493. *Clark v. Henry*, 2 *Cowen's Rep.* 324. *Roach v. Cozine*, 9 *Wend. Rep.* 227.) Suppose Whitmore had filed his bill to redeem, pro

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ducing these papers alone, can there be a doubt that he would be allowed to redeem? Or suppose a judgment creditor should claim to redeem under those papers, would he not be permitted? But beyond these papers, (which according to the case of *Kelleran v. Brown*, imply a debt, and that the conveyance was in security,) we have the fact proved and undisputed, that here was an indebtedness, of the precise amount of the consideration in the deed; which greatly strengthens the view now taken. We have the evidence of the fact that Whitmore has, ever since the conveyance, continued in possession of the premises. This is inconsistent with the idea of a sale, but is perfectly consistent with that of a mortgage. The fact of his payment of the interest on the \$500 mortgage, to the loan commissioners, as stated in his letter, shows that it was a mortgage. This payment of interest must have been on the 1st Tuesday of October. If he had sold the premises subject to the mortgage, why did he pay this interest? It is entirely inconsistent with the idea of a sale, but perfectly consistent with that of a mortgage. His requiring of Brown & Hone an assignment of the judgment against G. L. Fisher, shows that he considered the debt secured by the notes unpaid, and consequently that the conveyance was a mortgage.

The receipt given to Fisher & Whitmore, by Taylor, made the payment of the notes payment of the judgment, and so was the arrangement between Brown & Hone and G. L. Fisher, as appears by the answer. This receipt Whitmore had: it was given to him: he knew the effect of payment of the notes. Why, then, did he require an assignment of this judgment, if he considered the notes paid? This requirement is inconsistent with the idea that they were paid by the conveyance. Brown & Hone, who knew nothing of this receipt, and who considered the judgment paid by the notes, as Brown says, might well be willing to transfer it to Whitmore as mere matter of form. But the evidence shows that Whitmore intended to use it. The assignment was not thought of till after he got home, nor till L. T. Leach died; when it might be turned to good account. Whitmore's letter shows that the property was offered in secu-

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riety for payment of the debt on the 1st of September; and there is nothing, out of the answer, showing that the arrangement was different. Hone's testimony shows that he considered the conveyance merely as security for the payment of the debt on the 1st of September; and his whole conduct shows that he never dreamed that the arrangement was different. The assignment to the complainant shows that Brown & Hone so considered it then. There existed no reason at that time for them to have desired to call it a mortgage rather than a deed.

But it will be said that the debt was discharged, because the notes were given up and endorsed "settled." Also that an account current was made out and receipted. This, we contend, does not at all show that the debt was discharged, or that the new security was taken in payment. In *Clark v. Henry*, the notes were also given up, but that circumstance is made no account of by the court. (See also *Olcott v. Rathbone*, 5 *Wend. Rep.* 490; *Palmer v. Gurnsey*, 7 *Idem*, 248; and *Ainslie v. Wilson*, 7 *Cowen's Rep.* 662.) The giving up of a security does not discharge the debt. Nothing short of a payment will do this. The notes were but securities for the debt which the defendants had assumed. They are so spoken of in the answer. And the giving up of one security upon taking another, does not discharge the debt. The endorsement on the notes, rather confirms this view, than otherwise. Settled does not mean paid. We are constantly in the habit of speaking of an account as settled when a balance has been struck, or a note given for the amount. The defendants themselves speak of the giving the notes in settlement of the judgment against G. L. Fisher.

The defendants Fisher & Whitmore are liable to make up the deficiency of the debt which the proceeds of the sale leave unpaid. This follows from the fact that the property was taken in security. (*Ainslie v. Wilson*, 7 *Cowen's Rep.* 662 *Palmer v. Gurnsey*, 7 *Wend. Rep.* 248.) The debt remains unless it is paid; and of course the liability to pay continues. (*Olcott v. Rathbone*, 5 *Wend. Rep.* 490.) Even if the agreement

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had been to release the personal claim, and to take only the land as security, still, as Brown & Hone were induced to take it, under representations of Whitmore & Hepburn, that it was ample security, when Whitmore knew it was not, the defendants will now be held to make it good security. (3 *Cowen's Rep.* 537, 576.) Whitmore defrauded Brown & Hone in relation to the value of the property, and thereby induced them to take it. And therefore, even if the sale were absolute, the court will set it aside, and decree the payment of the debt by Fisher & Whitmore. And the court should now place the parties *in statu quo*. (*Whelan v. Whelan*, 3 *Cowen's Rep.* 537, 576.) This should be done notwithstanding Brown & Hone have assigned to the complainant; who stands in their place, and has, in this matter, all their rights.

THE CHANCELLOR. The decree in this case is erroneous; even if the vice chancellor is right in supposing that neither party intended to discharge the original indebtedness upon the notes, and that the deed and defeasance were a mere collateral security for the payment of that original indebtedness. For the decree charges the defendant Whitmore, as well as G. Fisher, with the balance which may remain due upon all three of the notes, if the proceeds of the sale of the premises shall not be sufficient to pay them in full; although Whitmore was not indebted to Brown & Hone for any part of two of those notes, and merely signed the name of his firm to the third note as security for his father-in-law. And certainly he cannot be charged as on an implied covenant, to pay the debt of another, by the execution of the deed. For, under the provisions of the revised statutes there is no implied covenant for the payment of the debt intended to be secured thereby. But on the contrary, the statute declares, that where there is no express covenant for such payment, contained in the mortgage, and no bond or other separate instrument to secure such payment has been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. (1 *R. S.* 738, § 139.) And no covenant can now be implied in any conveyance of real estate,

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whether such conveyance contains special covenants or no. (*Idem*, § 140.) Where a mortgage, therefore, is taken for the security of a pre-existing indebtedness, without any intention of discharging the original debtor from personal responsibility upon his former security, his liability upon that security will remain, notwithstanding the debt is further secured by such mortgage. But if the original indebtedness is intended to be discharged, and a mere mortgage is taken to secure the amount, without any express covenant to pay the same, and no bond or separate instrument is given to secure such payment, the mortgagee has no remedy upon any implied agreement of the mortgagor to pay the amount secured by the mortgage; but must resort to the land alone, or the proceeds thereof, for payment. The result will be the same where an absolute deed is taken as a mere security for the repayment of the consideration of such deed, instead of an ordinary mortgage; and where there is no covenant, or other instrument, rendering any one personally liable for the debt intended to be secured.

In the present case there is no covenant, in the deed executed by Whitmore, binding him to refund the consideration money, mentioned in that deed, in any event; or to pay the notes which were given up and cancelled by the grantees in the deed at the time it was given. Nor did he or his father-in-law execute any bond, or other separate instrument, binding them or either of them to such payment. And, as Whitmore was not personally liable for the payment of two of these notes, he would not have been liable for the deficiency, so far as those two were concerned, if the notes themselves had not been cancelled, and he had signed a written agreement that the notes should remain as a collateral security for the payment of the amount of the consideration money expressed in the deed, in case the proceeds of the land itself should not be sufficient to pay the amount.

From a careful examination of the documentary evidence in this case, in connection with the positive answer of the defendant Whitmore, responsive to the bill, and after giving all due weight to the testimony in behalf of the complainant, I cannot

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resist the conclusion that the deed of May, 1838, was intended to be received as a substitute for, and in full discharge of, the individual liability of G. Fisher upon two of the notes, and of the liability of him and his copartner jointly upon the other note. The cancelling of the notes by Brown & Hone, and giving them up to Whitmore, and the making out of a formal statement or account against Fisher & Whitmore, in which that firm was charged with the three notes, together with the interest and costs of protest, amounting to the exact consideration expressed in the deed, and their formally receipting that account and delivering it to Whitmore, appear to be acts which are wholly inconsistent with the idea that Brown & Hone expected or intended to reserve to themselves the right to sue G. Fisher, or the firm of Fisher & Whitmore, on either of those notes, in case the amount mentioned in the deed and agreement of May, 1838, was not paid by the first of September thereafter; or if the proceeds of the house and lot, upon a sale thereof, should not be sufficient to pay the same.

From the testimony in the case, I have very little doubt that Brown had received such information as to the value of the property, either from Whitmore and Hepburn, or from those to whom he had been referred, in the county where it was situated, as to induce him to suppose it to be worth much more than the amount then due upon the notes; and that the house and lot would unquestionably be redeemed within the time specified in the written agreement given by himself and his partner to Whitmore. He also probably supposed that if the money was not paid by the day, he and his partner would be the absolute owners of the property, so that they could sell it and pay themselves. In this view of the case, he may have considered the deed a mere security for the amount which was due upon the notes before they were given up and cancelled. And it may not have been considered necessary by him to examine the question whether the grantees in the deed would have a personal claim against any one for the deficiency, if the premises should not be redeemed, and could not be sold for enough to pay the amount intended to be secured by this conveyance.

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As I have arrived at the conclusion that neither of the appellants is liable for the deficiency, or any part of it, it is perhaps a matter of very little consequence to them whether the deed is to be considered an absolute conveyance, with an agreement to re-sell to Whitmore upon certain conditions, or as a security for the payment of money merely, so as to require a foreclosure to give to the complainant a perfect title to the land. If the value of the house and lot had been so much greater than the amount of the three notes as Brown & Hone supposed it to be, at the time they took the deed, as a substitute for the prior indebtedness, I should think the transaction was intended as a mere security; and that Whitmore would have the same equity of redemption as if he had given a mortgage in the ordinary form to secure the same amount, without personal liability to pay the debt if the mortgaged premises should prove to be insufficient for that purpose. And the conclusion that in equity the grantor had a redeemable interest in the premises, is strengthened by the fact that there was a verbal agreement that he should retain possession of the house and lot until the time fixed for the payment of the money arrived, and without paying rent in the meantime. In this respect, as well as in some others, this case is like that of *Roach v. Cozine*, (9 Wend. Rep. 228,) where the supreme court held that the grantor had an equity of redemption, notwithstanding his conveyance was absolute on its face. The defendant Whitmore also states, in his answer, that he applied for an extension of credit on giving security upon the property; but that Brown declined to take it except in the form of an absolute deed. I am therefore of opinion that if the premises had been as valuable in fact as they were represented to be, and Whitmore had applied to redeem after the first of September, 1838, and the complainant had insisted upon holding the property, this court would have held that the transaction was in fact a security for the consideration money mentioned in the deed, and the defeasance or agreement to re-convey.

The proper course therefore is to reverse the decree of the vice chancellor, and to declare that the deed was a security in

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the nature of a mortgage, but without personal responsibility on the part of either of the defendants for the payment of the amount intended to be secured thereby; and directing a strict foreclosure, unless Whitmore and wife redeem, by paying the \$1726,73, and interest from the first of September, 1838, within thirty days after the entry of the decree upon this appeal. Or, if the complainant prefers it, he may have a decree declaring that the deed was an absolute conveyance, as the defendants have insisted in their answer; and not a mortgage. And in the latter case, the complainant will be entitled to the rents and profits of the premises, while the defendant Whitmore has occupied them as a tenant at will, at least for six years. If the complainant elects to have such a decree entered, the bill will be dismissed, upon that ground; and without prejudice to his right to bring an action at law for the recovery of the rents and profits of the premises.

In either case, I shall not give the appellants costs, either upon this appeal or in the suit before the vice chancellor. For I am satisfied, from the testimony, that Brown & Hone were very greatly deceived in relation to the real value of the property; and that they were induced, by the representations of Whitmore, to believe that he would redeem the property, and thus enable them to obtain the amount justly their due, when he in fact knew that the premises, subject as they were to the state mortgage, were not worth in cash any thing like the amount of their debt.

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Where a mere error in calculation has occurred in a master's report, the court of chancery, upon further directions, may direct the report to be amended; although no exceptions have been filed, and without sending such report back to the master to be corrected; but where the report has been followed by an order or decree of the court, for the payment of the balance as found due by the master, the report cannot be amended while the order or decree founded thereon remains in full force.

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And after the order of the chancellor, confirming the report and directing the payment of the money, has been affirmed by the appellate tribunal, he is not authorized to set aside or alter that order, as erroneous.

A receiver, upon the passing of his accounts, is not entitled to an allowance out of a fund in his hands as receiver, for counsel fees which he has paid on an unsuccessful defence to a suit brought against him by the owner of such fund; nor for the expenses of an unsuccessful appeal brought by him from the decree in such suit.

THIS case came before the chancellor, upon the petition of the defendant Roberts, to correct certain alleged errors in a master's report, made under the decree in this cause. One or two of the alleged errors were errors in computation only, and the others were omissions to credit the petitioner for sums which had been paid out by him; but the last mentioned errors did not appear upon the face of the report, or of the schedules annexed thereto. The petitioner had excepted to the report in relation to the allowance of interest against him on actual balances; but his exceptions did not involve the question as to these alleged errors, except so far as the interest and commissions were concerned. Those exceptions were overruled by the chancellor, and the report was confirmed; and the order of confirmation was followed by a further direction, contained in the same order, requiring the petitioner to pay over the balance found due from him, by the report of the master, with interest on that balance from the date of the master's report. From that order the petitioner appealed to the court for the correction of errors; where it was subsequently affirmed. The receivers of the Utica Insurance Company, who were entitled to the balance reported due from the master, consented to have the alleged errors corrected, if the petitioner would consent to correct and offset against them, in part, certain errors in the master's report, which appeared to have occurred upon the other side of the account. This not being assented to by the petitioner, he made the application to the chancellor.

Upon the hearing of the petition, the counsel for the receivers insisted, that from the proceedings which had taken place, the chancellor had no power to correct the report in this manner. But in behalf of his clients he consented to have the errors corrected according to equity, provided the errors which had

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occurred in the report, as against them, were also corrected by the chancellor.

J. Lynch, for the petitioner.

D. Marvin, for the receivers.

THE CHANCELLOR. The objection that this court has no authority to correct the report of the master, without the consent of the parties who oppose the application, appears to be well taken. Where a mere error in calculation has occurred, the court, upon further directions, may direct the report to be amended, although no exceptions have been filed; and without sending it back to the master. But where, as in this case, the report has been followed by an order or decree of the court, for the payment of the balance as found due by the master, the report cannot be amended while the order or decree founded upon such report remains in full force. (*Turner v. Turner*, 1 Wils. Ch. Rep. 471; 1 Swans. Rep. 54, S. C.) And after the order of the chancellor, confirming the report and directing the payment of the money, has been affirmed by the appellate tribunal, he is not authorized to set aside or alter that order, as erroneous. The counsel for the receiver, however, consents that an order may be made for a deduction from the amount reported due, by the master, provided the errors on their side of the account are also corrected.

Those errors are in allowing to the petitioner counsel fees for an unsuccessful defence in the original suit, and upon an unnecessary appeal by him to the court for the correction of errors. That defence was not made by him in his character of receiver, but as one of the defendants in that suit merely. Neither was the appeal made by him in his capacity of receiver. And even if it had been, it would not have entitled him to charge the expenses of an unsuccessful appeal, upon a fund in his hands belonging to the respondents in such appeal. He should not, therefore, in the passing of his accounts as receiver in the cause, have been allowed the \$50 paid to Mr. Butler as his counsel in

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the original cause, nor the \$100 paid to Mr. Reynolds upon the argument of the appeal. These two sums, with interest on the first from December 31st, 1836, and on the last from the same day and month in the next year thereafter, down to the 20th of April, 1847, the date of the master's certificate annexed to the petition in this matter, must be deducted from the \$274.80 mentioned in that certificate. And the balance, with interest thereon from the last mentioned date, must be allowed to the petitioner; towards the principal and interest still due from him, under the order of the 15th of April, 1845.

The receivers offered to have the errors corrected, upon equitable principles, before this application was made. The petitioner must therefore pay to them, or their solicitor, the taxable costs of opposing this application.

JACKSON vs. FORREST and LEGGETT.

A person having a judgment of \$400 against L., who subsequently died, filed a bill against F. and the administratrix of his deceased debtor, for the purpose of reaching certain real estate which, as the bill alleged, L. had purchased and taken a conveyance for, in the name of F.; but in fact for his own use and benefit. The bill also alleged that L., in his lifetime, confessed a fraudulent judgment to F., which was prior to the complainant's judgment, and that the administratrix of L. had paid or applied his personal estate, amounting to \$10,000, to the payment of the judgment of F., knowing that such judgment was fraudulent. And the complainant prayed for an account, against the administratrix, of the administration of the estate of L., and for an account, against the defendant F., of the moneys and property which he had received from the administratrix, in payment of the fraudulent judgment; and that the defendants, or one of them, might pay the amount due on the complainant's judgment, with costs; *Held* that the bill was multifarious.

Held also, that the creditor had no right to follow the personal estate of the debtor into the hands of a third person, to whom it was alleged the administratrix had paid it in her own wrong; without showing that the administratrix and her sureties were irresponsible.

Held further, that the defendant F. was not a proper party to a bill against the ad-

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ministratrix for an account and payment of the complainant's debt, out of the personal estate which had come to her hands; and that the administratrix was not a proper party to a suit to have the complainant's debt paid out of the real estate of the decedent, the title to which was taken in the name of F.

Where the consideration of a conveyance is paid by one person, and the conveyance is taken in the name of another, for the purpose of defrauding the creditors of the person advancing the money, although such conveyance is valid as between the parties, and vests the whole legal and equitable title in the grantee, it is fraudulent as to creditors. And a creditor, having a judgment against the person advancing the money, may file his bill against the fraudulent grantee, to set the deed aside; so far as to have his judgment satisfied out of the land. But the administrator of the person advancing the money upon the purchase of the land, is not proper party to such a bill.

THIS case came before the chancellor, upon the separate demurrers of the defendants, to the complainant's bill, for multifariousness. The object of the bill was to reach certain real estate of W. Leggett deceased, which, as the bill alleged, he purchased and took the title for in the name of the defendant Forrest; but purchased, in fact, for his own use and benefit. The bill also alleged that Leggett, in his lifetime, confessed a fraudulent judgment to the defendant Forrest, which was older than the judgment recovered by the complainant against Leggett; and that the defendant E. Leggett, the administratrix of the estate of W. Leggett her husband, had paid or applied the whole or the greater part of the personal estate of the intestate to the payment of the judgment of Forrest, knowing that such judgment was fraudulent at the time she so applied the intestate's property for the payment thereof. The complainant therefore prayed for an account, against the administratrix, of the administration of the estate of her deceased husband, and for an account against the defendant Forrest, of the moneys and property which he had received from her in payment of the judgment alleged to be fraudulent; and that they, or one of them, might pay the complainant the amount due on his judgment and the costs of the suit, or for such other or further relief as the complainant was entitled to upon the case made by his bill.

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W. Silliman, for the complainant. The bill alleges, and the demurrer admits, that the complainant has the oldest bona fide judgment against Leggett, and that by collusion between the defendants, Forrest has swept away all the personal estate of Leggett, under his previous fraudulent judgment. It appears by the pleadings that the complainant is first entitled to be paid the full amount of his judgment, out of the personal estate of Leggett, before any other person can receive any thing out of that estate; and that the defendant Leggett, as administratrix of the deceased, has been bribed by Forrest to deliver all the estate to him, without any sale being made, towards the satisfaction of a prior fraudulent judgment on which nothing was due. This shows abundant equity on the part of the complainant. Forrest admits that he has acquired all the estate, real and personal, of the debtor Leggett, amounting to over \$10,000, in order to defraud his creditors, of whom the complainant is first entitled to be paid in full; and yet he insists that the complainant has no equity.

The next objection is that the complainant has a remedy at law. The mode of redress at law ought to be pointed out, and the court in which it can be obtained; for it certainly is not very obvious. It rests with the defendant to show how the complainant could obtain the intestate's library, &c. from Forrest; and that even if there is remedy at law, there cannot be relief also in equity.

The next objection is that the bill is multifarious, in calling for an account from the administratrix, and also a refunding or proper application of the personal property which Forrest has fraudulently, collusively, and by bribery and corruption, obtained from a debtor and his administratrix, which property they hold in trust for creditors. It is every day's practice to unite in one suit a fraudulent trustee and a person with whom he has colluded to the prejudice of the cestui que trust. A common creditor's bill is a familiar example of bills of this character. A large proportion of these creditor's bills seek to avoid fraudulent transfers of property which should be applied to pay debts.

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The next cause of demurrer assigned, is that the demand of the complainant is barred by the statute of limitations. This is not sufficiently pleaded. It does not show what statute is referred to, nor the number of years deemed requisite to create a bar. But if sufficiently pleaded, it does not appear that Forrest did not receive the personal property in question within one hour before filing the bill; and as to it, and also the real property, it is alleged and admitted that Forrest now holds them in trust for creditors. The statute does not apply to the whole bill, and if does to any part, the demurrer is too broad. The demurrer being frivolous, and put in for delay, there should be a final decree upon it that Forrest pay the whole of the complainant's demand; he having fraudulently obtained more than ten times its amount from the intestate's property.

O. L. Barbour, for the defendants. The bill in this cause seeks to obtain an account from the administratrix, and also to recover on the ground of certain alleged fraudulent transactions between the intestate, William Leggett, and the defendants. It is in this respect multifarious, and should be dismissed. (*Salvidge v. Hyde, Jacob's Rep.* 151, *overruling S. C. 5 Madd.* 138. *Story's Eq. Pl.* § 274 *et seq.*) The complainant prays that the defendant Forrest may pay the debt; and that the administratrix may account and pay it. It is not charged that there was any fraudulent combination between the defendant Forrest and the administratrix to cheat the complainant; and of course a decree against the administratrix can only be had on the ground of assets in her hands. If so, the claim against the defendant Forrest, as trustee, is evidently inconsistent, and renders the bill multifarious.

The bill charges that the defendant Forrest is a trustee of the creditors of Leggett, both as to real and personal estate. This is founded upon the allegation that the real estate is in fact the property of Leggett; and it is entirely inconsistent with the demand for an account from the administratrix. The bill is, for this reason, also multifarious, and bad. It has three distinct objects: to obtain an account from the administratrix; to

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set aside the sale, by the administratrix, to the defendant Forrest, of the personal property, and to make Forrest a trustee as to the real estate conveyed to him by Yerks. It therefore comes strictly within the definition of multifariousness, viz. to demand by one bill several matters, of different natures, against several defendants. To prove this, it is only necessary to see that the complainant, on the frame of this bill, would be entitled to a decree against the administratrix, or the defendant Forrest, in either of these cases—1st. If he succeeds in showing that the inventory on file was not just and true, and in obtaining an account showing assets in the hands of the administratrix; 2d. If he succeeds in establishing his allegation that the conveyance of the real estate was fraudulent; and 3d. If he succeeds in establishing the charge that the sale of the personal property was fraudulent. It is impossible that a bill which seeks relief so various, and of such different natures, can be good. And so far as the bill endeavors to make the defendant a trustee, on the ground of an alleged conspiracy to defraud the complainant, it presents no case for the interference of the court. A trust cannot be raised in this manner.

As to the statute of limitations. The ground of action here being the alleged fraud, there is a concurrent jurisdiction in the courts of common law and of equity; and the rule at law applies as to the limitation. (2 R. S. 301, § 49.) That rule, in a case like this, is six years. (*Idem*, 296, § 19.) The 52d section does not apply. Leggett died in May, 1839. The bill was filed in February, 1847; nearly eight years thereafter. It is to be assumed that letters of administration were taken out, and settlement of the estate closed, within a year or fifteen months from the death of the intestate.

The personal estate is the primary fund for the payment of debts. And that must be exhausted before a creditor can resort to the real estate of the decedent. There is no allegation in the bill that the administratrix has not a sufficient amount of personal property in her hands, belonging to the estate, to pay all debts. Without such an allegation the bill cannot be sustained. Even if the administratrix had not sufficient personal property

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in her hands to pay this debt, the creditor would not be authorized to proceed against the real estate, until he had exhausted his remedy against the administratrix, and her sureties, by a suit upon the administration bond. The bill alleges that Leggett left personal property to the amount of \$10,000. Of course the administratrix gave security to the amount of \$20,000. She could not have obtained letters of administration without giving a bond in that amount. (*See 2 R. S. 20, § 42.*) There is nothing to show that this bond is not in existence, and an ample security for the payment of the complainant's debt.

THE CHANCELLOR. There is an error, in the bill with which I have been furnished, in stating the commencement of the complainant's suit against W. Leggett to have been in October term, 1839; which was subsequent to the death of the latter, as stated in the bill. This, probably, was a mere slip of the pen, as the time of the recovery of the judgment is stated to have been in January of that year. The error in stating the time of the commencement of the suit is therefore probably immaterial.

There is no foundation for the objection that the suit against the administratrix is barred by lapse of time. For it is not stated when administration was granted to her upon the estate of her husband. But I think the objection that the bill is multifarious is well taken.

It is alleged that the personal estate of the decedent, which came to the hands of his administratrix, was about \$10,000. And the amount due upon the complainant's judgment, including interest thereon, was less than \$900, at the time of filing the bill in this cause. There is nothing in this case, therefore, to show that the complainant has not a perfect remedy against the administratrix and her sureties, for the amount due upon his judgment. He has then no right to follow the personal estate into the hands of a third person, to whom, if the allegations in the bill are true, she has paid it in her own wrong. The defendant Forrest, therefore, was not a proper party to a bill against the administratrix, for an account and payment of

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the complainant's debt, out of the personal estate which had come to her hands. And I see no reason for making Forrest a party, except for the purpose of depriving Mrs. Leggett of the benefit of his testimony in the suit; an answer on oath from both defendants being waived by the bill.

On the other hand, if the consideration of the conveyance to Forrest was actually paid by W. Leggett, and the deed was taken in the name of the former for the purpose of defrauding the complainant, and other creditors whose debts then existed, that conveyance was valid as between the parties; and vested the whole legal and equitable title in the grantee, under the provisions of the revised statutes. (1 R. S. 728, § 51.) It was fraudulent, however, as to the complainant, as an existing creditor. And he has a right to file his bill against Forrest to set it aside, so far as to have his judgment satisfied out of the land of the fraudulent grantee thereof. (*Idem*, § 52.) But in relation to that part of the bill in this cause, the administratrix was improperly made a defendant. And her testimony may be very material for her co-defendant, in respect to that part of the complainant's bill.

The demurrers of the defendants respectively must therefore be allowed. And the bill must be dismissed, with costs to each, upon the ground of multifariousness. That, of course, will not prevent the complainant from filing new bills, against the defendants separately, for the relief to which he may be entitled against them respectively.

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To authorize a party to produce, at the hearing, documentary evidence which is not made an exhibit before the examiner, nor distinctly referred to in the pleadings, the notice of intention to make use of such evidence should state sufficient of the substance of the document intended to be produced, to enable the adverse party to see that it is evidence of some fact against him.

The object of requiring the party to give notice of his intention to use documentary

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evidence upon the hearing, ten days before the closing of the proof; is to enable the adverse party to produce evidence before the examiner to counteract the effect of the documentary evidence mentioned in the notice.

A verdict for the plaintiff, in an ejectment suit, not followed by a judgment, is not tantamount to an eviction of the tenant; when the question as to the effect of such a verdict arises between the tenant and his grantor with warranty.

Where an answer on oath is not waived, matters stated in the bill as being within the personal knowledge of the defendant are to be taken as true, upon the hearing. But not where the complainant, by waiving an answer on oath, elects to take upon himself the burthen of sustaining the allegations in his bill without the aid of a discovery from the defendant.

Where an answer on oath is waived by the complainant, the answer is a mere pleading; and the general traverse at the conclusion thereof puts every thing in issue which is not admitted by the answer; as provided for by the 40th rule of the court of chancery.

A complainant cannot avail himself of a part of the new matters which are set up in the defendant's answer, as a mere pleading, to make out a case for relief not stated in his bill, and at the same time reject other matters connected therewith as a part of the defence stated in the answer.

It seems that a verbal agreement made by the grantee of land, at the time of the conveyance thereof to him with warranty, cannot be set up, either at law or in equity, as a defence to a suit for a breach of the covenant of warranty contained in such conveyance; and that all verbal agreements which would be inconsistent with the general covenant of warranty against all persons, must be considered as merged in the written covenant.

The mere fact that a purchaser of real estate, who has a covenant of warranty from the grantor, is sued for the purpose of recovering the premises, by persons claiming title paramount to his deed, will not authorize such grantee to come into the court of chancery for relief against an action at law, for the unpaid purchase money for the premises.

The case of *Johnson v. Gere*, (2 *John. Ch. Rep.* 546,) commented upon; and the decision, as reported, questioned.

The mere fact of a failure of title in the vendor, affords no sufficient ground for the purchaser's coming into a court of equity for relief, where he has not been disturbed in his possession, and where no suit has been brought against him by the rightful owner of the land. And the bringing of an ejectment suit against the grantee of lands, by persons claiming to have a title paramount to that of the grantor, without establishing the fact that the plaintiff in the ejectment suit is the real owner of the land, affords no sufficient ground for the grantee coming into the court of chancery for relief, against an action at law for the recovery of the unpaid purchase money due to the vendor of the land.

Nor is it a valid defence to a suit in chancery, for the foreclosure and satisfaction of a bond and mortgage given for the purchase money upon a sale of the land, that an ejectment suit has been brought against the mortgagor, by a stranger claiming the land.

Where the title of the grantor of land was perfect at the time he conveyed the same

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with warranty, but one of the conveyances through which that title is derived has not been recorded, and the grantee subsequently receives that deed from his grantor under an agreement by him that he will procure it to be recorded, but he neglects to do so ; and in consequence of such neglect he loses the title to the land, by its being sold by the sheriff under a subsequent judgment against the grantor in such unrecorded conveyance, *it seems* the court of chancery would relieve the covenantor against an action brought against him, on his covenant of warranty, by his grantee.

THIS was an appeal from a decree of the assistant vice chancellor of the first circuit, dismissing the complainant's bill. The defendant Avery, in June, 1836, conveyed to the complainant Miller, a tract of land in Lycoming county, in the state of Pennsylvania, with warranty, for the consideration of \$300 ; and took back a note from Miller for the purchase money, payable in five years with interest. And in September, 1843, Avery commenced a suit upon his note in the supreme court of this state. In December thereafter, an ejectment suit was brought against Miller in Pennsylvania, by persons claiming title to the lands conveyed to him. The bill in this cause was thereupon filed, for the purpose of obtaining an injunction to restrain Avery from proceeding in his action upon the note until the determination of the ejectment suit ; and if that should be determined in favor of the plaintiffs therein, then for a perpetual injunction against Avery. An answer of the defendant upon oath was waived ; but Avery put in an answer on oath, for the purpose of obtaining a dissolution of the preliminary injunction which had been granted upon filing the bill. A replication to the answer was filed, but no proofs in the cause were taken by either party. But more than ten days before the entering of the order to close the proofs, the complainant's solicitor gave notice that, upon the hearing, he intended to use an exemplified copy, under the seal of the court in Pennsylvania, of the record of the proceedings and verdict in the ejectment suit mentioned in the bill. The notice did not, however, state that any judgment had been rendered upon the verdict in the ejectment suit, or whether the verdict was in favor of the plaintiffs or of the defendant in that suit. At the hearing, a copy of the minutes of the clerk of the court in Pennsylvania was produced, under the

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seal of the court, showing that an ejectment suit had been commenced, for the land mentioned in the deed to the complainant, by the issuing of a summons, which did not appear to have been served ; that on the day such summons was issued, and before the return day, Miller appeared by his attorney and pleaded the general issue, and that subsequently a verdict was rendered for the plaintiffs. But it did not appear by the clerk's minutes produced at the hearing, what evidence of title was given by the plaintiffs on that trial, or whether they claimed by title derived from Miller subsequent to the deed of Avery to him, or by virtue of a paramount title.

H. Van Der Lyn, for the appellant. The bill in this cause was filed and the injunction granted on the authority of *Johnson v. Gere*, (2 *John. Ch. Rep.* 547 ;) cited by the chancellor in *Woodruff v. Bunce*, (9 *Paige*, 445,) and by Justice Bronson in *Edwards v. Bodine*, (26 *Wend.* 114.) The assistant vice chancellor has overruled these decisions without referring to a single authority, in equity, to support his decision. Ever since Chancellor Kent made his decision in 1817, in the case of *Johnson v. Gere*, it has been recognized by our highest tribunals as an existing and binding authority in courts of equity. The bill in this cause was therefore rightfully filed ; and the injunction thereon was properly granted.

It is admitted that the fact that an ejectment suit had been brought against Miller, to recover the land under a paramount title, could not avail Miller as a defence to the action at law, in the suit of Avery against Miller, to recover the consideration for the land sold by Avery to Miller. This is one of the cases in which equity corrects the law, where by reason of its universality it is defective. And the court of chancery interferes by injunction, to stop a vendor, with warranty, from proceeding at law to collect the price of the land, at the same time that his vendee is sued in ejectment to recover from him the possession of the land, by persons claiming a paramount title, until the ejectment suit is determined. What can be more equitable than the decision in *Johnson v. Gere*? Avery

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is bound by his warranty deed to indemnify and defend Miller against the ejectment suit, in Pennsylvania, to recover the lands from Miller under a paramount title. Avery is the real defendant in the ejectment suit. While that suit is pending and the title to the land is in jeopardy, he has no equitable right to collect the price of the land from his vendee. For the result of that suit will determine whether he has any right whatever to the consideration money for the land. It is inequitable that he should collect the price before the result of the ejectment suit is known. For if his title is overthrown, his right to the price is lost; and if he has collected it, he will be bound immediately to restore it to the vendee.

S. McKoon, for the respondent. The preliminary injunction in this cause was granted on the following charges in the bill of complaint; that the defendant well knew that no legal title to the premises was conveyed to the complainant by the defendant's warranty deed, for which the note was given; that an ejectment had been commenced against the complainant by persons claiming the paramount title to the premises; and that the defendant was in low pecuniary credit, and probably insolvent. The first and third charges are expressly denied in the answer. The second is admitted; but a state of facts is detailed which shows conclusively that the legal title was in the defendant at the time of his conveyance to Miller, and that the complainant, by omitting to put his title deeds upon record, has involved himself in an ejectment suit with a subsequent purchaser under a judgment against Church, the common source of title.

This cause is to be determined upon the matters contained in the bill and answer; and the answer is to be taken as true. (7 *John. Ch. Rep.* 217. 2 *Cowen's Rep.* 118.) It will be seen by a reference to the chain of conveyances stated in the bill and answer, that Church is the common source of title, and that the plaintiffs, in the ejectment suit, claim title by virtue of a purchase at a sheriff's sale, held nearly one year after the defendant conveyed the premises to the complainant. If all the

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deeds had been recorded when given, the record evidence of the complainant's title would have been perfect. When Avery conveyed to Miller, the latter knew that the deed from Church to Maynard and the deed from Maynard to Avery were not recorded; and he agreed with Avery to get them recorded if Avery would deliver them to him for that purpose. In pursuance of that proposition Avery delivered to Miller as well the deed from Church to Maynard, as the deed from Maynard to Avery; and the defendant swears in his answer that "he relied upon the good faith, honesty and integrity of the complainant to cause the same to be recorded in pursuance of his agreement." If the plaintiffs in the ejectment suit, recover against Miller, therefore, Avery is excused; upon the ground of the laches of Miller in not recording the deeds, which he had had in his possession for that purpose nearly a year previous to the sheriff's sale under which the plaintiffs in the ejectment suit claim title. As well might Miller claim that Avery's covenant of warranty extends to liens acquired by the state of Pennsylvania for the non-payment of taxes subsequently assessed, as to the lien acquired by the purchaser at the sheriff's sale. Nothing short of an eviction will amount to a breach of a covenant of warranty. (*Tallmadge v. Wallis*, 25 Wend. 115.)

No fraud being established against the defendant, and his solvency being unquestionable, the injunction should be dissolved. And the proceedings upon the note being in the supreme court and the defendant solvent, the complainant should be left to his remedy upon his covenant.

The decree dismissing the complainants' bill was based upon the opinion of the assistant vice chancellor, that the answer of the defendant must be taken as true; that it denied all the equities of the bill, and absolved the defendant from the charges of fraud and insolvency; and that the complainant had an ample remedy at law upon the covenants as to the title. And the defendant insists that it would be inequitable and oppressive to continue the injunction under the state of facts as detailed in the answer; and therefore asks that the decree of the vice chancellor be affirmed with costs.

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Van Der Lyn, in reply. A replication to the defendant's answer having been filed, and an order to produce witnesses and to close the proofs having been entered, the complainant noticed the cause for hearing in September, 1845, before the assistant vice chancellor. The defendant's counsel is wrong in supposing that every thing stated in his answer is to be taken as true. The 36th rule only applies where a defendant moves to dissolve an injunction. Then, and for that purpose the answer, will have no other or greater force as evidence than the bill. The whole force of the defendant's argument rests on the effect he imputes to the parol agreement set up in his answer as having been made between Avery and Miller at the time of the giving of the warranty deed from the former to the latter. That agreement, if ever made, was void in law; because it was merged in the absolute covenants of the deed, and because it could not contradict the deed. The defendant cannot impart any validity to it, by setting it up by way of defence to contradict and vary the absolute covenant of warranty in his deed. (*Hunt v. Amidon*, 4 *Hill*, 346.) The verbal agreement, stated in defendant's answer, is wholly inadmissible to vary or discharge the absolute covenant of warranty in the deed. Besides, a covenant under seal cannot be discharged or impaired by a parol agreement before breach. The discharge must be under seal. (*Suydam v. Jones*, 10 *Wend.* 184.) The parol agreement being void and inoperative, must be laid aside, in the argument of this cause. What follows? The defendant admits in his answer, and proves it by setting forth in his answer extracts from the records of Lycoming county, Pennsylvania, that the plaintiffs in the ejectment suit against Miller, who were the purchasers of the land at the sheriff's sale under a judgment in favor of Montgomery against Church, have acquired the record title to the land, by the recording of the deed of the sheriff to them; that Avery's title to the premises has failed, by the omission to record the deed from Church to Maynard, the grantor of Avery; and that the plaintiffs in the ejectment suit must succeed against Miller. Hence the ejectment suit could not fail to terminate, as it has in fact done, in

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the overthrow of Miller's title under Avery, and in the eviction of Miller from the land; and in Avery's loss of the right to the \$300, the price of the land, and the costs and expenses of defending the ejectment suit in Pennsylvania, and the costs recovered in the ejectment suit against Miller.

As the learned counsel of the defendant have produced no authority to impair the equitable rule established in the case of *Johnson v. Gere*, nor denied that the case of the complainant is in all respects like that, there can be no doubt that the injunction in this cause was rightly granted, and ought to be continued; and that the decree of the assistant vice chancellor should be reversed with costs.

THE CHANCELLOR. The paper produced at the hearing was properly rejected by the assistant vice chancellor, even if it was competent for the complainant to give in evidence an eviction under paramount title, subsequent to the commencement of the suit, and without filing a supplemental bill stating the fact of such eviction. In the first place, the notice was not sufficient to authorize the complainant to produce, at the hearing, a record of a verdict in the ejectment suit against the complainant. To authorize a party to produce, at the hearing, documentary evidence which is not made an exhibit before the examiner, nor distinctly referred to in the pleadings, the notice should state sufficient of the substance of the document intended to be produced, to enable the adverse party to see that it would be evidence of some fact against him. The object of requiring the party to give notice of his intention to use documentary evidence upon the hearing, ten days before the closing of the proofs, was to enable the adverse party to produce evidence before the examiner to counteract the effect of the documentary evidence mentioned in the notice. Thus, if the complainant had given notice to the defendant before the proofs were closed, that the ejectment suit had been brought to trial, and that a verdict had been rendered for the plaintiffs in that suit, and that a copy of the minutes of the clerk, duly authenticated so as to make it legal evidence under the law of the United States, would be

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produced at the hearing, showing that fact, it would have been competent for the defendant in this suit, to produce evidence before the examiner to show that the verdict had been obtained by collusion between the parties in the ejectment suit, or that it was obtained upon proof of title to the land derived from Miller himself; or that the verdict had been subsequently vacated or set aside by the court in which it had been rendered. The complainant had a right to produce the documentary evidence referred to in the pleadings, to prove the fact of the ejectment suit, and for what premises it was commenced, if that fact was not sufficiently admitted in the answer of the defendant; but for no other purpose. Nor was a verdict in an ejectment suit, not followed by a judgment, tantamount to an eviction. So that the evidence would not have helped the complainant, if a proper notice of the nature and effect of the documentary evidence intended to be produced had been given. This case, therefore, must be decided upon the facts as they existed at the time of the commencement of this suit, and as they are presented by the pleadings.

The assistant vice chancellor was right, as to the construction of the last clause of the 17th rule. Where an answer on oath is not waived, matters stated in the bill as being within the personal knowledge of the defendant, are to be taken as true upon the hearing. But not where the complainant elects to take upon himself the burthen of sustaining the allegations in his bill, without the aid of a discovery from the defendant, by waiving the answer on oath. For in that case, the answer is a mere pleading; and the general traverse at the conclusion thereof, puts every thing in issue which is not admitted by the answer; as provided for by the 40th rule of the court of chancery.

The new matters set up in the answer, as a defence, are not proved, and cannot therefore avail the defendant, if the matters of the bill which are admitted in the answer are sufficient to entitle the complainant to a decree granting the relief asked for in his bill, or any part of it. The complainant, however, cannot avail himself of a part of the new matters, which are

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set up in the answer as a mere pleading, to make out a case for relief not stated in his bill, and at the same time reject the other matters connected therewith as a part of the defence stated in the answer.

The charge in the complainant's bill is, that at the time of the execution of the deed to the complainant, and when he gave his note for the purchase money of the land in Pennsylvania, he believed that the deed conveyed to him a good title to the land, but that he has since discovered that the defendant's title was defective and void, as against the paramount title of other claimants, the real owners of the land; that the complainant did not obtain the legal title under the defendant's deed; and that the owners of such paramount title have since commenced an ejectment suit against the complainant, to establish their rights to such land. The bill further charges that at the time of the commencement of the suit upon the note, Avery was insolvent or irresponsible, and that he then knew no legal title to the land was conveyed to Miller by the deed of 1836. The answer denies these allegations in the bill, and shows that the defendant, instead of being insolvent or irresponsible, has a large visible property, and is worth ten times the amount of the consideration mentioned in his warranty deed. This leaves the complainant's right to relief in this case to stand upon the simple grounds that a suit has been commenced against him, by persons claiming to be the owners of the land for the purchase money of which the note was given, and that the defendant has given a deed with warranty. For I have looked in vain for any allegation in the bill, or admission in the answer, that by the laws of Pennsylvania a judgment, recovered against a former owner of real estate, is a lien upon land which he had previously conveyed; so as to give to a purchaser under an execution upon the judgment a title which will overreach a conveyance from the judgment debtor, made before the recovery of the judgment, where the deed from the sheriff is recorded before the recording of such prior conveyance. Such is not the rule of the common law. And if there is any statute, or other local law in Pennsylvania, changing the rule of the

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common law in this respect, our courts cannot take judicial notice of it. But it must be proved as a matter of fact, if not admitted by the pleadings in the suit.

It may be proper to state, however, that if there is such a local law in Pennsylvania, the matters set up in the answer, if proved, would be a bar to any suit by the complainant here for relief, even if the defendant was insolvent and a recovery had been obtained against the grantee of Avery upon the ground that the purchasers had acquired the legal title to the land because their deed was recorded previous to the recording of the conveyance of December, 1833, from W. Church to A. K. Maynard; and that too without reference to the allegation in the defendant's answer that the purchasers at the sheriff's sale knew, at the time of their purchase, that the judgment debtor had no title to the land when the judgment was recovered, or at the time of the sale of all his interest in the land, by the sheriff.

The answer states that in December, 1833, which was nearly two years before the recovery of the judgment under which the plaintiffs in the ejectment suit purchased, W. Church, against whom that judgment was subsequently recovered, conveyed the land in question to Maynard, by a conveyance duly executed and properly acknowledged, and that in April, 1834, Maynard conveyed the same land to Avery, the defendant in this suit; which last mentioned conveyance has been recorded in the county where the lands lie. The answer further states that at the time of the conveyance from Avery to Miller, the latter was informed that the deed from Church to Maynard was not recorded, and agreed to get it recorded himself; that shortly after the conveyance to the complainant, in June, 1836, and in the course of that summer, Miller received from Avery the deed from Willard Church, for the purpose of having it recorded in conformity with the previous agreement of the parties; and that if there is any defect in the record evidence, of the title of Miller to the land, such defect is owing to his neglect to have the deed, from Church to Maynard, recorded previous to the sheriff's sale in May, 1837.

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It is not necessary to inquire here, whether the verbal agreement made at the time of the conveyance of the land with warranty, by Avery, could of itself be set up as a defence, either at law or in equity, to an action for a breach of the warranty contained in that conveyance. I am inclined to think, however, it could not; and that all such verbal agreements which would be inconsistent with the general covenant of warranty against all persons, would be considered as merged in that written covenant. It would unquestionably be so merged at law. (*Hunt v. Amidon*, 4 *Hill's Rep.* 345.) And I see no good reason why it should not have the same effect in a court of equity, as a mere question of evidence. If it was necessary, therefore, that the deed from W. Church should be recorded in order to protect the complainant's title against a subsequent conveyance from Church, or a conveyance upon a sale under a subsequent judgment against him, I think Miller might have insisted that Avery should be at the trouble and expense of having the deed from Church to Maynard properly recorded.

But if Miller intended to insist upon his legal rights, under the written covenant of warranty, the proper time to do so was when that deed was delivered to him to be recorded; pursuant to the verbal understanding of the parties which existed at the time of the conveyance of the land by Avery to him. By receiving the deed for the purpose of putting it on record, and without any objection on his part that the verbal agreement to do so, which he had previously made, was not binding, he deprived the defendant Avery of the power of putting it on record himself, and thus protecting the title of his grantee. And having by his own negligence lost the title to the land, it would be unconscientious for him afterwards to insist upon enforcing his general covenant of warranty against the defendant. The facts stated in the defendant's answer, therefore, would form a first claim to relief in equity against Miller, if he should endeavor to enforce his covenant of warranty in an action at law, upon the ground that the title to the land conveyed to him had been lost by not recording the deed within a reasonable time after it was received by him for the purpose of being recorded.

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And what would in this court be a ground for relief against an action at law upon the covenant of warranty must, if proved, be a good defence to a bill for relief, against the suit upon the note, because the title to the land has been lost by failing to record the deed from Church to Maynard.

The question, therefore, recurs in this case ; does the mere fact that a purchaser of real estate who has a covenant of warranty from the grantor, is sued for the purpose of recovering the premises by persons *claiming* title paramount to his deed, authorize such grantee to come into the court of chancery for relief against an action at law, for the unpaid purchase money of the premises? And upon this point, I think the decision of the assistant vice chancellor was right. The appellant's counsel relies upon a decision of the late Chancellor Kent; upon an *ex parte* application for an injunction, in the case of *Johnson v. Gere*, (2 *John. Ch. Rep.* 546.) If the whole substance of the complainant's bill, in that case, is stated in the report, it is undoubtedly a case which goes upon all fours with the present, and is entitled to all the weight which a mere *ex parte* decision of that learned jurist, who made it, ought to receive. I think it is evident, however, that the reporter was under a mistake in the statement of the case, or that the chancellor overlooked the fact that it was not alleged in the bill that the complainants even believed their title to the land was defective. For it cannot be possible that he intended to decide that a mere claim of a paramount title by a third person, and the bringing of a suit upon that claim against the purchaser, was sufficient to authorize this court to stay the vendor, who had warranted the title, from proceeding at law or in equity to collect the unpaid purchase money. If the law was so, any vendee who was not ready to pay his purchase money when it became due, might make a secret arrangement with some third person to claim the premises and bring an ejectment suit therefor, and thus tie up the vendor from collecting his debt, indefinitely. For, if the vendor should be allowed by the court at law to interfere with the defence of the ejectment suit, so as to get it out of court within a reasonable time, the plaintiff might sue

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nit to a nonsuit and then bring a new action. And such new action, either by the original plaintiff or by a new claimant, would entitle the vendee to a new decree, staying the collection of the unpaid purchase money, until the final termination of that suit. I concur in the suggestion of the assistant vice chancellor in *Banks v. Walker*, (3 N. York Leg. Obs. 343,) that the complainant's bill, in the case of *Johnson v. Gere*, set out the will of J. M. Pierson, from which it was apparent that his widow had but a life estate in the premises, and that the title which Gere derived under her failed at her death; so that her infant children must succeed in the ejectment suit, which their guardian had commenced in their names, for the recovery of the land conveyed by Gere with warranty. Whether that state of facts would enable the vendee, or his legal representatives, to come into this court for relief, before an actual eviction, where the vendor who had conveyed with warranty, was not only solvent but abundantly able to pay any sum which might be recovered against him in an action at law upon his covenant, is at least doubtful. It is sufficient to say that it has frequently been decided that the mere fact of a failure of title in the vendor affords no sufficient ground for coming into this court for relief; where the purchaser has not been disturbed in his possession, and no suit has been brought against him by the rightful owner of the land. (*Bumpus v. Platner*, 1 John. Ch. Rep. 218. *Woodruff v. Bunce*, 9 Paige's Rep. 443. *Withers v. Morrell*, 3 Edw. Ch. Rep. 560. *Edwards v. Bodine*, 26 Wend. Rep. 109.) And it is equally clear that the mere bringing of an ejectment suit against the grantee of lands, by persons claiming to have a title paramount to that of the grantor, without establishing the fact that the plaintiff in the ejectment suit is the real owner of the land, affords no sufficient ground for coming into this court for relief, against an action at law for the recovery of the unpaid purchase money due to the vendor of the land. Nor is it a valid defence to a suit in this court, for the foreclosure and satisfaction of a bond and mortgage given for the purchase money upon a sale of the land. That question was correctly decided by the assistant vice chan-

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cellor, in *Banks v. Walker*, (3 *New-York Leg. Obs.* 340.) And he very properly followed that decision in the present case.

The decree appealed from must therefore be affirmed with costs.

THE ONTARIO BANK vs. MUMFORD and others.

[Not followed, 6 Fed. Rep. 61. Overruled, 2 Keyes 530.]

As a general rule, the court of chancery will not entertain a suit brought by the assignee of a debt, or a chose in action, which is a mere legal demand; but will leave him to his remedy at law, by a suit in the name of the assignor.

Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, to prevent a failure of justice, he will be allowed to bring a suit in chancery, in his own name, upon a mere legal demand.

In this state no provision is made, by law, authorizing the assignee of a chose in action to bring a suit at law in the name of the assignees in bankruptcy of his assignor, without their consent. And where it appears that the assignee in bankruptcy, of the obligee in a bond, refuses to join in a suit for the recovery of the damage consequent upon a breach of the condition thereof, such refusal will justify the interference of the court of chancery, in behalf of the assignee of such bond, if the only remedy of such assignee, at law, is by an action in the joint names of the assignor thereof and of his assignee in bankruptcy, or in the name of the assignee in bankruptcy alone.

Where a debt is due to two persons jointly, and one of them is decreed to be a bankrupt, or where one of them makes an assignment under the insolvent acts, the action for the recovery of the debt, in a court of law, must be brought in the names of the other creditor and of the assignees, jointly; and neither can sue in his own name alone.

Nor can the suit be brought in the joint names of the original creditors, in such a case; except where the bankrupt was a mere nominal owner of the debt, as trustee or otherwise.

Assignees in bankruptcy do not take the whole legal title in the bankrupt's property, as heirs and executors do. Nothing vests in them, even at law, but such estate as the bankrupt had a beneficial as well as a legal interest in; and which interest is to be applied, by the assignees, for the payment of the debts of the bankrupt.

The fact that the assignment of a bond, and the damages to be recovered thereon, in the name of the assignor, is not absolute and unconditional, but merely as a collateral security, makes no difference with respect to the right of the assignee to sue in the name of the assignor alone. The action in such a case must be brought

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in the name of the assignor; and it cannot be sustained if brought in the names of his assignees in bankruptcy, who have no interest therein. And even if the assignor of the bond were dead, that would afford no excuse for the assignee's coming into a court of equity for relief. For the suit upon the bond may, in that case, be brought in the name of the assignee, under the provision of the statute on the subject, in case there is no personal representative of the decedent, or where such representative refuses to sue for the damage sustained by a breach of the condition of the bond.

THIS was an appeal from a decree of the vice chancellor of the eighth circuit, allowing the demurrer of the defendant G. H. Mumford, one of the defendants, and dismissing the bill as to him. The complainants' bill showed the following state of facts: In July, 1837, the defendant E. H. S. Mumford was the owner of a flouring mill and lot of land, in the county of Monroe, which was subject to the lien of a mortgage for \$10,000, given by him to W. W. Mumford; and which was then held by Edward, Rufus, and Frederick Prime, as assignees and trustees. E. H. S. Mumford, being such owner, sold the premises to H. Hutchinson for \$23,000; and to induce Hutchinson to become such purchaser, agreed to pay off and discharge the mortgage thereon, or to obtain a release of the premises from the lien of the mortgage, and to give Hutchinson a bond with security for the performance of that agreement. A bond was thereupon given to Hutchinson, by E. H. S. Mumford as principal, and by G. H. Mumford as his surety, in the penalty of \$20,000, dated the 14th of July, 1837; with a condition which recited the agreement of E. H. S. Mumford, and stated that the bond was to be void if E. H. S. Mumford should *not* at all times hereafter indemnify Hutchinson, and save him harmless from the mortgage, and from the payment of any moneys thereon, or by reason thereof. In January, 1840, Hutchinson mortgaged to the complainants the flouring mill and lot so conveyed to him, together with other property, to secure the payment of a debt of \$11,000, and interest. And at the same time, as a part of the security for that debt, Hutchinson made an absolute assignment to the bank of all his right and title to the bond of E. H. S. and G. H. Mumford; and authorized the bank to use his name for the recovery of any damage he might at any time

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thereafter be entitled to recover under, or by virtue of, such bond, as fully as he could himself do. In March, 1842, the amount due upon the prior mortgage, then held by the Primes, not having been paid, the holders and owners of that mortgage commenced a suit for the foreclosure of the same, before the vice chancellor: in which suit, Hutchinson and the Ontario Bank, together with the obligors in the bond of indemnity, and others, were made defendants. And the usual decree for a foreclosure and sale of the mortgaged premises was subsequently made in that suit; under which decree all that part of the mortgaged premises, in the county of Monroe, which had been mortgaged by Hutchinson to the bank, was sold by a master, in December, 1842, and was conveyed to the purchaser, who entered into possession thereof under such conveyance. Previous to March, 1842, the bank commenced a suit against Hutchinson, to foreclose his mortgage; in which suit W. W. Mumford, who claimed some interest in the mortgaged premises by title subsequent to the complainants' mortgage, was made a defendant. And in June, 1842, the usual decree for a foreclosure and sale was made in that suit, with a decree over against Hutchinson, for the deficiency, in case the mortgaged premises should not sell for sufficient to pay the debt and costs. In April, 1843, the whole of the mortgaged premises were sold, by a master, under this last mentioned decree, for the sum of \$305; leaving the deficiency still due to the bank, as reported by the master, more than \$12,000.

After the commencement of both of these foreclosure suits, Hutchinson petitioned the district court of the United States for a discharge under the bankrupt act; and in May, 1842, he was, by the decree of that court, duly declared a bankrupt, and all his property was vested in E. D. Smith, one of the defendants in this suit, as assignee in bankruptcy. Whether Hutchinson was ever discharged from his debts under the bankrupt act, or whether at the time of presenting his petition to the district court he had any interest in the mortgaged premises, which could pass to the assignee under the decree in bankruptcy, did not appear. But the bill alleged that the assignee in bank

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ruptcy either had, or claimed, some equitable interest in the bond assigned by Hutchinson to the bank; and that he had refused to join with the complainant in a suit upon such bond. The bill also contained a charge that the premises conveyed to Hutchinson, by E. H. S. Mumford, if free from the incumbrance of the mortgage mentioned in the condition of the bond of the defendants E. H. S. and G. H. Mumford, would have been a good and ample security to the Ontario Bank for its debt; and that the bank would have been able to collect the full amount due upon its mortgage, by a foreclosure of the same, if E. H. S. Mumford had paid off the previous mortgage, or procured a release of the premises from the lien thereof. The complainant therefore prayed that the obligors in the bond to Hutchinson might be decreed to pay the amount of the deficiency due to the bank upon the foreclosure of its mortgage.

The defendant G. H. Mumford, the surety in the bond to Hutchinson, demurred to the bill; and stated as causes of demurrer: *first*, that no sufficient breach of the condition of the bond was stated in the bill, showing a present liability of the obligors in the bond to the complainant; and *second*, that the remedy of the complainants, if any they had, was by an action at law upon the bond. And the vice chancellor allowed the demurrer, and dismissed the bill upon the last ground stated in the demurrer; without expressing any opinion upon the first.

The following opinion was delivered by the vice chancellor.

WHITTLESEY, V. C. This is the case of a bond of indemnity assigned to the complainants, upon which, by the rules now in force, the complainants could sue at law in the name of the obligee; but upon which they came into this court for their remedy, without suggesting any special reason for resorting to this jurisdiction.

It has been held in some cases, both in this country and in England, that equity will not lend its aid to enforce the rights of the assignee of a chose in action, unless its interposition becomes necessary, by reason of the inability of a court of common law to do him adequate justice. And further, that the assignee

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of a chose in action must pursue his remedies in the same tribunals in which the assignor, had no assignment been made, was bound to seek them. It is only when obstacles are interposed, to the remedy at law, that chancery will lend its aid. (*Adair v. Winchester*, 7 Gill & John. 114. *Gover v. Christie*, 2 Har. & John. 67. *Charter v. United Ins. Co.*, 1 John. Ch Rep. 463. *Hammond v. Messenger*, 9 Simons, 327.) There are cases, however, the other way. (*Winn v. Bowles*, 6 Munf. 23. *Young v. Person's adm'r.*, 2 Hayw. 223. 2 Story's *Equity*, § 1057, a., 3d ed.) In this case there does not seem to be any good reason stated for coming into this court. There is no special ground for equitable relief stated; nor is any discovery sought. The bill indeed does state an injury or damage to the assignees, the complainants, and not to the obligee; and from this it is suggested, in argument, that the obligee in the bond must fail in a suit at law, in his name, upon the issue of *non damnificatus*, as no injury or damage can be shown to him. It can hardly, however, be contended, I think, that the proof of damage or injury, according to the letter of the bond, will be less strenuously insisted upon, in this court, than in a court of law. The assignment of the bond was the mere assignment of the right to receive the damages which the obligee might sustain. And in the prosecution of a suit upon it, for the benefit of the assignee, damage or injury must be shown to have been sustained by the obligee, or the plaintiff must fail in any court. This can be shown as well in a court of law as in this court, and that appears to be the proper tribunal to try the question of damage.

The demurrer is allowed; and the bill must be dismissed, with costs.

A. Taber, for the appellants. The bond of E. H. S. Mumford and G. H. Mumford to Hutchinson, executed simultaneously with the deed from E. H. S. Mumford, was a collateral security for the performance by him of his agreement, as stated in the bill, that he would pay off and discharge the prior mortgage upon the premises. The bond had respect to the title and

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not the person of the obligee. The assignee of Hutchinson's title, then, could claim the benefit of this collateral security. The bond was equivalent to a covenant, by both obligors, against incumbrances upon the land. The complainants became assignees of Hutchinson to the extent of \$11,000, by virtue of the mortgage from Hutchinson to them, for that amount, upon the premises, and for which they paid a full consideration. And if the mortgage itself did not make the complainants assignees of Hutchinson's title, yet the foreclosure of the mortgage and purchase of the premises by the complainants did; and it gave them, in equity, the same remedy against the obligors which Hutchinson himself had before the assignment.

There was in fact an assignment to the complainants of the bond, as well as of the premises to which it related; and the acceptance of the mortgage by the complainants was upon the faith and in reliance that the bond would protect the title from the previous incumbrances. And the complainants have sustained damages directly, by reason of the previous mortgage, to the full amount due upon their mortgage. The bill states that had the previous mortgage been paid and discharged, according to the condition of the bond, the mortgaged premises would have been good security for the full amount secured to the complainants by the mortgage; but that, by the foreclosure of the previous mortgage, the title was cut off and the complainants' security destroyed.

The defendant cannot allege that Hutchinson himself is not damnified by the previous mortgage; for by reason of that mortgage a decree has been obtained, and enrolled and docketed against him personally, for the deficiency still due the complainants; and, as the bill states, there would have been no such deficiency had the previous mortgage been paid according to the condition of the defendant's bond.

A court of equity is the proper tribunal to afford relief in this case, and not a court of law. The transactions set forth in the bill would give the complainants an equitable claim to the bond in question, and for relief against the defendants, had there been no assignment in fact of the bond to them. For the bond

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was an equitable guaranty of the complainant's mortgage. And there was an assignment in fact of the bond, and of the rights of assignees, which formerly could only have been enforced in a court of equity. The case therefore is properly cognizable by this court; although, in modern times, courts of law allow suits to be maintained in the name of the assignor for the benefit of the assignee. This court has no right to relinquish its ancient and acknowledged jurisdiction on that ground.

The decree or judgment against Hutchinson personally was a breach of the condition of the bond given to indemnify him; and whether the damages extend to the full amount of such decree is immaterial; the bill cannot be dismissed on the demurrer. A bond for mere personal indemnity may be enforced by bill in this court. And before the foreclosure of the previous mortgage, the defendants might have been compelled to pay off and discharge the same. As that cannot now be done, they can only indemnify Hutchinson, or his assignees, by paying the amount which has been lost by reason of the previous mortgage; and the prayer of the bill in this case admits of that relief.

In support of these propositions, which are designed to meet the first cause of demurrer, I cite the following cases; which I think establish the principle, that where a collateral security is given for the payment of a debt, or the fulfilment of a contract or any other engagement, the party to whom the debt is to be paid, or the engagement is to be fulfilled, has a right to the collateral security; and that this right will pass to him, whoever is in possession or owns the original right, and it may be enforced in a court of chancery in the name of the latter. The first case which I cite is referred to in almost all the subsequent cases on this subject. It is *Maure v. Harrison*, (*Eq. Cas. Abr.* 93, *K.* 5;,) where it was adjudged that a bond creditor shall, in chancery, have the benefit of all collateral bonds. In *Moses v. Murgatroid*, (1 *John. Ch.* 118,) that case is referred to with approbation. And the court says that these collateral securities are in fact trusts, created for the better security of the debt; and it is the duty of this court to see that they fulfil their design *Phillips v. Thompson*, (2 *John. Ch.* 418;) *Curtiss v. Tyler*

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(9 *Paige*, 432,) and *Halsey v. Reed*, (*Id.* 446,) are cases which decide that where an endorser or the assignor of a bond and mortgage takes additional security, or indemnity to himself, it shall enure to the benefit of the holder of the principal debt. *Homer v. The Savings Bank of New Haven*, (7 *Conn.* 478;) *Russell v. Clark*, (7 *Cranch*, 69;) and *The United States v. Sturges*, (1 *Paine's C. C. Rep.* 525,) are also cases in which the principle contended for is settled or acknowledged. Several of these cases were bonds of indemnity; and the bills were filed by the assignee, or the person equitably entitled to the benefit of the bond, and not by the obligee himself.

As to jurisdiction, it must be conceded that originally this court alone had jurisdiction in cases of assignment; and that such jurisdiction is not to be abandoned because courts of common law may in certain cases of assignment give a remedy. (1 *Story's Eq.* § 1057. *Id.* § 64, note i., 3d ed. 7 *Paige*, 560.) The case of *Hammond v. Messenger*, (9 *Sim. Rep.* 327,) which will be cited on the other side, Justice Story says is not law in this country. This case, however, is not merely a suit by a naked assignee, showing no cause for coming into the court of equity. Our case, as stated in the bill, is purely equitable, and arises exclusively from principles of equity. Possibly an action at law, in the name of Hutchinson, could not be maintained for any thing but the damage arising from the personal decree against Hutchinson, which he has not yet paid; nevertheless the complainants stand in his place, and they show that they have sustained damage.

Assuming that the sale under the \$10,000 mortgage, the conveyance to, and possession taken by the purchaser, was an eviction of Hutchinson, or the assignee in bankruptcy, and was at the same time a destruction of so much of the complainants' mortgage security as rested on the land in question, both have sustained damage by the breach of the condition to indemnify. Indeed the decree against Hutchinson was a breach of the bond in question; taken as a mere bond of indemnity. (3 *Com. Dig.* 112, *Condition to indemnify.* *Fish v. Dana*, 10 *Mass Rep.* 46.) And this court will sustain a bill to compel the per

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formance of a covenant for general indemnity. (*Ranelagh v. Hayes*, 1 Vern. 189. 1 Ch. Cas. 146, S. C. *Buckingham v. Ward*, 3 Atk. 385. 10 Ves. 161, S. C. *Champion v. Brown*, 6 John. Ch. 405.) Hutchinson, as appears by the bill, has not been discharged; yet he has been declared a bankrupt, by which his title to the land, and his interest in the residue of the bond, passed to the assignee in bankruptcy; with the right to sue for the same in his own name. Under the English bankrupt acts, nothing passes to the assignees, except those things in which the bankrupt had some beneficial interest, applicable to the payment of his debts. A mere trust interest, held by the bankrupt for another, does not pass. (*Scott v. Surman*, Willes, 402. *Winch v. Keeley*, 1 T. R. 619. *Carpenter v. Mornell*, 3 B. & P. 40. *Gladston v. Hadwin*, 1 M. & S. 526.) But if any, even the most remote beneficial interest was held by the bankrupt, an action at law for that interest, at least, may be maintained, in the name of the assignees. (*Per Lord Alvanly*, 3 B. & P. 41.) How then would these complainants and the assignee stand in regard to their respective remedies at law? There must be a suit in the name of Hutchinson, on this bond, for the whole damages, which evidently could not be maintained; because it would be necessary that he should recover not only the damage to the complainants, the legal title to which damage may be supposed to remain in him, but also the damage to himself, the legal title to which has passed to the assignee. Or a suit must be brought in the name of the assignee in bankruptcy; which, for a similar reason, would be impracticable. For there is no law, which invests the assignee with the right to prosecute for the benefit of a cestui que trust of the bankrupt. He is not the holder of so much of the legal title to this contract as supports the equitable interest of the complainants. A suit in the joint names of Hutchinson and the assignee in bankruptcy, would be impracticable. For the law does not permit two persons, whose rights have accrued at separate times, and who have no joint or common interest, to unite in a suit upon the same contract. And if they should do so, and should recover, and one of the parties should receive all

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the damages recovered, it would require a suit in equity, at the end of that suit at law, to apportion those damages between them. Separate suits on the same covenant, in the name of the bankrupt, and of his assignee, clearly could not be maintained. For the law does not permit a contract with a single individual to be split up, and sued for in parcels. No such action, as any of those above supposed, has been sustained at law. I assume, that any such remedy at law is at least doubtful and difficult; whereas, the authorities cited show the matter of this bill to be within the ancient and acknowledged jurisdiction of this court. If this be so, this court will never dismiss us, and send us upon an errand of doubtful experiments in a court of law. (*Am. Insurance Co. v. Fisk*, 1 *Paige*, 92. *Teague v. Russell*, 2 *Stew. Alab. Rep.* 420.)

F. M. Haight; for the respondent. The complainants' remedy, if any they have, is at law. It will not be pretended that Hutchinson could have come into this court, to seek his remedy, in case of a breach of this condition. He must have brought his action at law. Are the complainants, coming here simply as assignees of this bond, asking for no discovery, and suggesting no special ground of equity jurisdiction, in any better condition for invoking the interference of a court of chancery than Hutchinson would have been? We contend not. The cases are numerous, both in this country and in England, holding that the mere relation of assignee of a chose in action, recoverable in a court of law, will not authorize a party to come into this court for relief; and that in order to sustain his bill, the complainant must show that he cannot sue at law. Or he must show that the assignor refuses to allow his name to be used as plaintiff, at law, or some similar ground of equitable jurisdiction. (*Mitf. Pl.* 123.) The assignee of a chose in action has not a right in all cases, to come into a court of equity upon the mere ground that he cannot sue in his own name at law. He must show that he is prevented from suing in the name of the assignor, or that the assignor himself would have had a right to go into a court of equity. (*Moseley v. Boush*, 4 *Rand. Rep.* 392.)

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Equity does not lend its aid to enforce the rights of the assignee of a chose in action, unless its interposition becomes necessary, by reason of the inability of a court of common law to do him adequate justice. (*Adair v. Winchester*, 7 Gill & John. 114. *Gover v. Christie*, 2 Har. & John. 67.) In *Smiley v. Bell, Martin & Yerg. Rep.* 378,) A. assigned to the complainant an open account against the defendant. A suit was brought at law in the name of A., but pending the suit he died, and no person would administer; whereupon the complainant filed his bill. But it was decided that the court of chancery had no jurisdiction. So in this court, upon a bill filed by the assignees of a policy of insurance, stating no other grounds for equitable relief than the assignment and the refusal of the insurers to pay, a demurrer, upon the ground that there was an adequate remedy at law, was sustained by Chancellor Kent. (*Carter v. United Ins. Co.*, 1 John. Ch. 463.) A similar case was determined in the same way in the English court of chancery as early as 1728, (*Moseley*, 83,) and that decision was affirmed in parliament. The same point was again decided by Lord Hardwick in 1739, (1 *Atk.* 547.) The chancellor, in each case, said that if such bills were sustained, the court of chancery would have to determine all policies. The same doctrine is reiterated in the English court of chancery as late as 1839. The case of *Hammond v. Messenger*, (9 *Sim.* 327,) decides that the assignee of a debt cannot file a bill in equity against the assignor and debtor; unless he clearly shows, in his bill, that he is unable to sue at law. The vice chancellor, in delivering the opinion of the court in that case, says, "As a general proposition, a person who has a right to sue B. in the name of A., for a debt due from B. to A., cannot file a bill in this court without special circumstances. I never remember such a bill without special circumstances." One of the circumstances relied upon in that case, to take it out of the general rule, was a pretence by the defendant that there was a private debt due to him from the assignors; which he claimed to be entitled to set off. But the court said that if there is such a right of set-off, at law, the defendant has a right to avail himself of it.

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The case of *Winn v. Bowles*, (6 *Munf.* 23,) which the vice chancellor seems to think holds a different doctrine, so far as I can gather from a note of the case in the Equity Digest, merely determines that the right of an assignee to come into equity is not affected by the statute of Virginia, which authorized him to sue at law in his own name. It does not necessarily conflict with the case in *Randolph*; which harmonizes with the other cases to which reference has been made.

Considering it then as established, that in order to sustain a bill in this court, it is necessary to allege some special grounds of equity jurisdiction, we proceed to the inquiry, whether such special circumstances are here shown. No reason is set out in the bill itself why the complainants could not proceed at law. There was no refusal on the part of Hutchinson to suffer his name to be used as plaintiff; nor was there any such refusal on the part of his assignee in bankruptcy, if it was proper to bring the suit in his name. The entire competency of courts of law to protect the rights of an assignee, against any collusion by the assignor, is perfectly well established; and nothing is suggested in this bill, which throws or is likely to throw any obstacle or embarrassment in the way of the complainants, in a court of law, in testing the liability of the makers of the bond. It was suggested indeed, upon the argument, as noticed in the opinion of the vice chancellor, that no breach could be shown in an action at law. But if that is the case, it is in itself a sufficient reason why this court should not entertain the bill. The defendants cannot be deprived of a legal defence by changing the forum; more especially in the case of a surety, will a court of equity refuse to extend or enlarge his legal liability.

If the court, under the circumstances of this case, will take cognizance of the alleged rights of the complainants, we say that the complainants have failed to show any breach of the condition of the bond set out in their bill. It is necessary, in discussing this point, to look particularly at the character of this bond; for it will be seen on reference to the bill, that the breach relied upon is a supposed injury resulting to the com-

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plainants, and not any direct damage to Hutchinson. The bond is strictly a bond of indemnity to Hutchinson, and for no other purpose. The condition must have the same construction in courts of law and of equity. The rules of interpretation in both courts are the same. (3 *Black. Com.* 434.) Neither court can vary the wills or agreements of men, or make wills or agreements for them. Both courts are to construe them truly, and therefore both will construe them uniformly. One court ought not to extend, nor the other to abridge, a lawful provision, deliberately settled by the parties, contrary to its just intent. Both courts will equitably construe, but neither can control or change, a lawful engagement. (*Idem*, 435.) If then equity follows the law in a case of this kind, and gives the same construction to the instrument, upon what ground can it be pretended that damage resulting to the complainants, and not to Hutchinson, works a forfeiture of the bond? Protection to Hutchinson personally, from any injury to result from the mortgage, was only stipulated for, not protection to his assigns, or to any person who shall thereafter have an interest in the mortgaged premises. The complainants, as Hutchinson's assignees, are entitled to receive the amount of such damages as he has sustained, and nothing more; and to recover any thing, they must show that he has sustained an injury. Will it be pretended that this bond has the qualities of a covenant running with the land, so as to entitle the complainants, as the assignees of the land, to recover for damages which they have sustained as owners of the second mortgage? If so, it takes away the only shadow of an excuse which the complainants have for coming into this court. They may bring an action at law in their own names. There are also two or three answers to any such suggestion. There was not, at the time this bond was executed, and there never has been, any privity of estate between Hutchinson and this defendant; which is essential to the creation of a covenant which shall run with the land. (*Platt on Cov.* 460.) Again; the condition has no connection with the land, and does not enlarge, abridge, or affect Hutchinson's enjoyment of it. It is not a covenant to pay

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off the mortgage: it is not to procure a release of the mortgaged premises: it is simply a personal covenant to indemnify Hutchinson against the mortgage. So long as he sustains no injury it is no matter what becomes of the land, or of the incumbrance upon it. But again; suppose it should be construed as a covenant running with the land, the complainants are not in a situation to avail themselves of it, in any court, so far as to recover for an injury to themselves, and not to Hutchinson. By their own showing they are simply mortgagees, and were never in possession of the mortgaged premises. While they held their mortgage from Hutchinson, and previous to any foreclosure thereof, the prior mortgage was foreclosed, and the mortgaged premises were sold and conveyed to B. Gibson; who entered into possession and still occupies the same. The subsequent foreclosure and sale, by the complainants, was a mere nullity: which gave no title, and conferred no possession, or right of possession. That a mortgagee out of possession is not an assignee of the land, so as to avail himself of a covenant running with the land, is perfectly well established in this state, though the English rule is now different. (*Astor v. Hoyt*, 5 Wend. 603. *Walton v. Cronly*, 14 id. 63.)

The bill in this cause does not allege any damage to Hutchinson, which would have entitled him to relief thereon, if no assignment had been made. The force and effect of a bond of indemnity has been fully and repeatedly settled in our courts of law; and we have no difficulty in deciding, upon authority, what constitutes a breach of the condition. The rule is, that upon a mere bond of indemnity, the plaintiff must show actual damages, before he can recover, though where the indemnity is coupled with a covenant to do certain acts, or to pay certain sums of money, it is otherwise. (*Van Slyck v. Kimball*, 8 John. Rep. 198. *Douglas v. Clark*, 14 Id. 177. *Jackson v. Post*, 17 Id. 482. *Matter of Myers*, 7 Wend. 499. *Luddington v. Pulver*, 6 Id. 404. *Chase v. Hinman*, 8 Id. 452. *Ward v. Fryer*, 19 Id. 494. *Thomas v. Allen*, 1 Hill, 145.) Here the bond being a bond of indemnity merely, Hutchinson would be bound to show that he had been compelled to pay money

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upon the mortgage mentioned in the condition, or that he had been evicted under that mortgage, before he could recover. The case of *Van Slyck v. Kimball*, above cited, is much like the present. There the defendant executed a bond to the plaintiff, conditioned to indemnify him against all demands, dues and damages whatsoever which might happen or arise under a certain mortgage. The plaintiff's land, which was encumbered by that mortgage, was sold under it; and his title was defeated. But when he brought his action, the court said that such a covenant of indemnity, was tantamount to a covenant for quiet enjoyment against the mortgagee; and that the plaintiff, to sustain his action, must show an eviction under the mortgage. Here there is not only an absence of any averment in the bill that Hutchinson paid any money upon the mortgage, or was evicted under it; but the case made by the bill shows directly the contrary. The land was sold upon a foreclosure of the mortgage, in December, 1842, it is true. But Hutchinson had parted with all his interest long before that time. If he had not previously disposed of it, it passed to his assignee in bankruptcy in May, 1842. All Hutchinson's interest was gone; and he had, for aught that appears, received its full value. He suffered nothing by the sale. It was no part of the condition of the bond that the land should sell for enough to pay the complainants' mortgage; and whether it did or did not, is immaterial, so long as Hutchinson sustained no loss from the prior mortgage.

If, then, we are right in assuming that the courts of law and equity construe the same instrument in the same way, it seems impossible to sustain this bill. And we are careful to distinguish this case from a class of cases where this court will grant relief upon instruments which are unavailable at law. Such, for instance, as reforming an agreement which by accident or mistake, does not conform to the clear intention of the parties; giving relief upon a bond, burnt or cancelled by mistake or accident; carrying into effect contracts, between husband and wife, void at law by reason of the marriage. These proceed upon the ground of carrying out and fulfilling the intention of the parties to the agreement. But when the contract is perfect

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in itself, and no surprise, fraud, accident or mistake is shown, neither this court nor any other can alter or enlarge the terms of the agreement. The court has no right to infer that a party intended to bind himself beyond the terms of the engagement he has thought fit to enter into. Otherwise the court would depart from its province of interpreting contracts, and would be making them for the parties. It may well be, judging from the recitals in the condition of the bond, that E. H. S. Mumford, the principal, contemplated paying off or otherwise discharging the lien of the mortgage, therein mentioned, upon the premises conveyed to Hutchinson; but is it thence to be inferred, that the surety intended to make himself liable for something not provided for in the terms of his engagement? I think not. The inference is the other way. The bond, if executed by E. H. S. Mumford alone, would naturally have provided for the payment of the Prime mortgage. But when the surety was to be bound he had a right to say, and it is to be inferred that he did say, that he would go no further than merely to indemnify Hutchinson personally.

There are some considerations growing out of the position of this defendant, as surety only, which give additional force to the views already expressed. It is well settled, as well at law as in equity, that sureties are not bound beyond the strict letter of their contract. (*Wright v. Russell*, 3 Wils. Rep. 530. *Staton v. Rastall*, 2 T. R. 366. *Walsh v. Bailey*, 10 John. Rep. 180. *Dobbin v. Bradley*, 17 Wend. 422. *Wing v. Terry*, 5 Hill, 160. *Birkhead v. Brown*, Id. 634. *Bank of Utica v. Dill*, 1 Paige, 466.) And this, too, where the contract falls short of the intentions of the surety. In *Phelps v. Garrow*, (8 Paige, 322,) a surety endorsed a draft, for the express purpose of becoming security to the drawers for the amount. Yet not being liable at law, it was held that he could not be charged in equity. In *Simpson v. Field*, (2 Chan. Cases 22,) the defendant, as surety, executed a recognizance, binding him to pay such sum of money as should be reported by N. H. a master. Before making a report, the master died. The chancellor, Ld. Clarendon, held that the remedy at law being

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gone, no relief could be afforded in equity; for in case of a surety, the court of chancery would never extend or enlarge the legal liability which the surety had assumed. The same principle is decided in a variety of cases. (*Ratcliff v. Gram*, 1 Vern. 196. *Sheffield v. Castleton*, 2 Id. 393. *Sumner v. Powell*, 2 Mer. 30. *S. C. on appeal*, 1 Tur. & Russ. 423. *Waters v. Riley*, 2 Har. & Gill, 305. *Ludlow v. Simond*, 2 *Caine's Cases in Error*, 1.)

A few words in answer to the course of argument employed by the complainants' counsel, before the vice chancellor, will complete all I have to say. He cites a number of authorities to establish the proposition, that when a collateral security is given, for the payment of a debt, the creditor is entitled to that security, whether he contracts with reference to it, and with a knowledge of it, or otherwise. Against this principle, we have nothing to say—but we contend that it is wholly inapplicable here, for the purposes for which the counsel wishes to use it. In the first place, the collateral security must have been given to secure the identical debt; and all the cases cited by the counsel show that the ground upon which the courts proceed is that it is a trust for the protection of the debt itself. Now this bond of indemnity had no connection whatever with the debt of the complainants. It was given to Hutchinson long before his mortgage to them; and without any possible reference to it. The counsel supposes that at all events it was collateral security for the payment of the prior mortgage. Not so. It was not an obligation to pay off the Prime mortgage. It was a mere personal indemnity to Hutchinson; and Prime could never have enforced it, if the mortgaged premises had failed to satisfy his mortgage debt, unless by showing damage to Hutchinson. But the greatest difficulty is yet behind. Suppose this bond to be a security which the complainants are entitled to reach. Their right to it cannot affect the construction of the bond—they cannot collect it before it is due. It cannot have one character in Hutchinson's hands, and another in the hands of the complainants. They have already reached it by virtue of Hutchinson's assignment. They have no neces-

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sity to come into this court to entitle themselves to it. Suppose it were a promissory note, given expressly to secure the payment of the complainants' debt: would the cases cited by the counsel be any authority for the complainants coming into this court to collect it? The complainants have the bond, but have they cited a single case showing that the condition is to be construed in the manner claimed by them? Not one. In whatever way they are to reach it, they must show a breach of the condition, before they can claim any benefit from it.

No argument can be derived from the consideration of the question, whether the bond, in its present shape, can be made to answer all the purposes which Hutchinson contemplated, or not. He was content to take it as it is; and it is to be presumed that all the embarrassments of his title were taken into consideration by him, and affected the price paid by him for the land. At any rate, neither he nor his assignees can ask to alter or enlarge the obligation which the parties to the bond agreed to take upon themselves.

THE CHANCELLOR. If a correct copy of the condition of the bond is set out in the bill furnished me, a mistake has occurred by inserting the word *not* in such condition; so as to make the bond *void* if E. H. S. Mumford should *not* indemnify the obligee against the mortgage, which was then a lien upon the premises. As G. H. Mumford was merely a surety in the bond, if the proper construction of the language of the instrument itself does not make him responsible for the neglect of his principal to indemnify the obligee, the bond cannot be reformed, so as to render him liable, even if it was his intention to bind himself at the time the bond was executed. For the statute of frauds requires an agreement in writing, to bind a surety. And if the surety has not already executed a valid agreement to answer for the debt or default of his principal, this court cannot compel him to execute such an agreement; upon the ground that he has attempted to do so, but has failed of accomplishing his object, by mistake or inadvertence. Whether the whole of this bond with its condition, when taken together,

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show the intention of the surety to agree and bind himself that his co-obligor should indemnify Hutchinson against all loss on account of the mortgage, so as to render the bond a good and available security at the time it was taken, is a question not necessary to be considered ; as I am satisfied the complainant must fail on another ground. In discussing other questions in the cause, therefore, I shall proceed upon the supposition that this is a bond to indemnify Hutchinson against the incumbrance of the mortgage, which was a lien upon the premises at the time of the conveyance to him, and to save him harmless from any damage which should be sustained by him, from the neglect of his grantor to pay off or procure a discharge of the mortgage ; as the condition of the bond states he had agreed to do.

The foreclosure suits were both commenced before the institution of the proceedings in bankruptcy ; but the decrees were made subsequent to the vesting of the equity of redemption in Smith the assignee, by operation of law, if that equity of redemption was in Hutchinson when he was decreed a bankrupt. And to render the proceedings in the foreclosure suits regular, and to give a perfect title to the purchasers under the decrees of foreclosure, the assignee in bankruptcy should have been brought before the court as a party. Whether that was done in either of the foreclosure suits mentioned in the complainant's bill does not appear. But upon the supposition that the bank has exhausted its remedy against the mortgaged premises, and that the sale under the decree upon the first mortgage exhausted the fund, which would have been appropriated to the payment of the bond and mortgage to the bank, if E. H. S. Mumford had paid off that prior mortgage, I think the complainant's bill shows a palpable breach of the condition of the bond. It also shows that by the neglect of the obligors to indemnify and save him harmless from the prior mortgage, Hutchinson sustained damage to the amount of the deficiency, which he was decreed to pay to the complainant ; even if the value of the premises conveyed to him, by Mumford, did not exceed the

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amount of the mortgage to the bank at the time of the sale of such premises under the decree upon the prior mortgage.

It remains to be considered whether there is any thing stated in the complainant's bill which is sufficient to authorize the court of chancery to take jurisdiction of this case ; instead of leaving the bank, as the assignee of the bond, to seek its remedy by an action at law against the obligors in such bond. As a general rule this court will not entertain a suit brought by the assignee of a debt, or of a chose in action, which is a mere legal demand ; but will leave him to his remedy at law, by a suit in the name of the assignor. (*Carter v. United Insurance Company*, 1 *John. Ch. Rep.* 463. *Hammond v. Messenger*, 9 *Sim. Rep.* 327. *Moseley v. Boush*, 4 *Rand. Rep.* 392. *Adair v. Winchester*, 7 *Gill & John. Rep.* 114. *Smiley v. Bell*, *Mart. & Yerg. Rep.* 378.) Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, to prevent a failure of justice, he will be allowed to bring a suit here upon a mere legal demand. Thus, in the case of *Lenox v. Roberts*, (2 *Wheat. Rep.* 373,) where the first Bank of the United States, previous to the expiration of its charter, had made an assignment of a debt, the late Chief Justice Marshall decided that the assignees could file a bill in equity, in their own names, for the recovery of such debt ; they not having the power to sue at law in the name of the defunct corporation. Here no provision is made, by law, authorizing the assignee of a chose in action, to sue in the name of the assignees in bankruptcy of his assignor, without their consent. And the bill of the complainant contains an express averment, that the assignee in bankruptcy of Hutchinson refused to join in a suit for the recovery of the damage consequent upon the breach of the condition of the bond in question. I should, therefore, have no doubt as to the jurisdiction of the court of chancery, in the present case, if it was necessary for the complainant to bring an action at law in the name of the assignee in bankruptcy, as well as in the name of Hutchinson, the assignor ; or to bring it in the name of the assignee in bankruptcy alone.

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Where a debt is due to two persons jointly, and one of them is decreed to be a bankrupt, or makes an assignment under the insolvent acts, the action for the recovery of the debt, in a court of law, must be brought in the names of the other creditor and of the assignees jointly; and neither can sue in his own name alone. Nor can the suit be brought in the joint names of the original creditors, in such a case, except where the bankrupt was a mere nominal owner of the debt, as trustee or otherwise. (*Bird et al. v. Caritat*, 2 John. Rep. 342. *Eckhart v. Wilson*, 8 Term Rep. 140. *Broom on Part.* 91.) But as early as 1743, Lord Chief Justice Willes had a *notion* that the assignees in bankruptcy did not take the whole legal title in the bankrupt's property, as heirs and executors did; and that nothing vested in the assignees, even at law, but such estate as the bankrupt had the beneficial, as well as the legal, interest in, and which was to be applied by the assignees for the payment of the debts of the bankrupt. But as his associates upon the bench were not prepared to put the decision of the case then under consideration upon that ground, the point was left undecided. (*Scott v. Surman*, Willes' Rep. 400.) That *notion* of this learned and distinguished jurist, however, was subsequently followed, and has long since become the settled law, not only in England, but in this state. In *Webster and others v. Scales*, (4 Doug. Rep. 7,) which case came before the court of king's bench about forty years afterwards, the bankrupt was one of several trustees, to whom an assignment had been made, for the payment of the creditors of the assignor, of whom the bankrupt was one at the time of such assignment in trust. And Lord Mansfield held, that a suit upon a bond given to such trustees, was properly brought in the name of the bankrupt and the other trustees; although the bankrupt had a beneficial interest in the trust fund, which had passed to his assignee in bankruptcy. Thereby deciding that a bankrupt trustee may sue as trustee for the benefit of his assignees in bankruptcy and others, when he has a beneficial interest as one of the cestuis que trust, in the instrument upon which the suit is brought, at the time he became a bankrupt. That deci-

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sion goes very far towards establishing the right of the complainant, in the case now under consideration, to sue, at law, in the name of Hutchinson, the obligee in the bond, even if the damage sustained by the breach of the condition of the bond was more than the amount of the deficiency due to the complainant; so as to give the assignee in bankruptcy an interest therein as such assignee. There is nothing in the complainant's bill, however, to show that the assignee in bankruptcy took any beneficial interest whatever in the bond of indemnity, which had been previously assigned to the complainant, as a part of the security for the payment of the bank debt. And as the amount of the deficiency upon the foreclosure of the complainant's mortgage, was considerably larger than the prior mortgage, I do not see how any one can infer that the assignees in bankruptcy can ever have any beneficial interest in the recovery which may be had upon the bond. Nor does the fact that the assignment of the bond, and the damages to be recovered thereon, in the name of Hutchinson, was not absolute and unconditional, but merely as a collateral security, make any difference as to the right to sue in the name of Hutchinson alone. This was decided in the case of *Winch v. Kelly*, (1 Term Rep. 619,) which came before the court of king's bench in 1787. There the debt, for which the suit was brought, was assigned by the bankrupt previous to his bankruptcy, as a security for the payment of a debt merely, with a condition that the assignment should be void if the debt was paid, at the time specified. And yet, the debt not having been paid, the court decided that the action for the recovery of the assigned debt was properly brought, by the assignee thereof, in the name of the bankrupt. For the previous assignment constituted the bankrupt a trustee of the mere legal right to bring the action; which action the cestui que trust had the right to bring in his name.

In *Carpenter v. Marnell*, (3 Bos. & Pul. 40,) it was again decided that the action in such a case must be brought in the name of the bankrupt, and that it could not be sustained if brought in the names of the assignees in bankruptcy. The decisions in our own courts also are in accordance with the

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principles settled in the cases referred to from the English reports. (See *Kipp v. The Bank of New-York*, 10 *John. Rep.* 63; *Hopkins v. Banks*, 7 *Cowen's Rep.* 650.) The vice chancellor was therefore right in supposing that the remedy of the complainant, if any, was by an action at law in the name of Hutchinson. And even if Hutchinson was dead, there would be no reason for coming into this court for relief. For the suit might then be brought in the name of the bank, under the provision of the statute on the subject, if there was no personal representative of the decedent, or such representative refused to sue for the damage sustained by a breach of the condition of the bond. (2 *R. S.* 445, § 5, 3d ed.)

The decree appealed from must therefore be affirmed with costs.

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A defendant in the court of chancery cannot object that another defendant, having no interest in the subject matter of the suit, is improperly made a party.

It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendant is improperly joined with him in the suit.

C. and S. purchased a lot of land from M., in their joint names, and gave back a joint bond and mortgage for the purchase money; C. subsequently conveyed to S. his undivided half of the lot, subject to the payment of that mortgage, and also conveyed his half of other real estate owned by them jointly, for the purchase money of which they had also given their bonds and mortgages, and S. agreed to pay the amounts due upon these several bonds and mortgages, and gave C. a bond of indemnity against the same; S. subsequently conveyed the lot in question to B. with covenants of seisin and warranty, and covenants against incumbrances; S. became insolvent and left the state, and failed to pay the amount due upon the bond and mortgage given to M.; and M. being about to foreclose the mortgage, B. induced him to bring a suit against C. upon the bond, instead of proceeding against the mortgaged premises; a rule *nisi* for judgment having been obtained, against C. in that suit, he tendered to M. the amount due upon the bond and

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mortgage with interest and costs, and demanded an assignment of the bond and mortgage to a third person, so that he might be enabled to enforce the collection thereof against the mortgaged premises; M., in collusion with B. refused to receive the money and make the assignment; C. thereupon filed his bill in chancery against M. and B. and obtained an injunction restraining him from proceeding in his suit at law against C.

Held, that it was immaterial whether, at the time of giving the bond and mortgage, the land or the bond was the principal security for the debt; that the subsequent agreement between C. and S., and the conveyance to the latter, constituted the relationship of principal and surety not only between the parties personally, but also in reference to the interest of S. in the mortgaged premises.

Held also, that the equitable rights of C. and S., under that agreement and conveyance, were the same as though S. had owned the whole lot originally, and had mortgaged it to secure his own debt, and C. had joined with him in the bond as a mere surety; that in such a case, as between the owner of the equity of redemption in the mortgaged premises and the surety in the bond, the land would be the primary fund for the payment of the debt; and that if the surety should be called upon by the mortgagees for payment, he would have the right to be subrogated, in their place, to their remedy against the land for the payment of the debt.

Held further, that it made no difference, in respect to the equitable right of C. to subrogation to the remedy of the principal creditor against the mortgaged premises, that a bond of indemnity had been given to him by S. For being insolvent, his sureties in the indemnity bond had an equitable right to insist that the mortgagee should resort to the mortgaged premises for payment; instead of collecting the debt from C., and thereby charging the same upon them as the sureties of S.

A person who purchases land subject to the payment of a prior mortgage thereon, has no legal right to have the mortgage debt charged upon the mortgagor personally, instead of charging it on the land upon which it was charged by the mortgage.

As between mere equitable claims, he who is first in time is superior in right.

THIS case came before the chancellor upon an appeal, by T. F. Monro and S. Beardsley, two of the defendants, from a decree of the vice chancellor of the seventh circuit; and upon a cross-appeal, by the complainant, from an order, forming part of such decree, suppressing a portion of the complainant's testimony. The facts of the case, as established by the pleadings and proofs, were as follows:

Previous to the 10th of March, 1834, the complainant and J. Seymour, one of the defendants in this cause, against whom the bill was taken as confessed upon notice to him as an absentee, were copartners in the cabinet-ware business in the village of Auburn. During the continuance of their copartnership

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they had contracted divers debts, and had purchased several parcels of real estate, for which they had taken conveyances in their joint names, and had given bonds and mortgages thereon ; several of which bonds and mortgages were outstanding and unpaid at the time of the dissolution of their copartnership. Among the real estate thus bought by them was a lot purchased from the defendant T. F. Monro and his then copartner E. Jones, upon which Cherry & Seymour had given back a mortgage, for the purchase money, and for which purchase money they had also given their joint bond. That mortgage had been duly recorded ; and at the dissolution of their copartnership there was due upon it about \$1900.

The copartnership between Cherry & Seymour was dissolved on the 10th of March, 1834. And in the settlement of the affairs of the copartnership between them, it was agreed that Cherry should convey to Seymour his undivided half of all the real estate which they held jointly, and that Seymour should pay all the bonds and mortgages which had been given by them jointly, and all the copartnership debts. It was also agreed that Seymour should give to Cherry a bond in the penalty of \$3000, with sureties ; conditioned for the payment of all those bonds and mortgages and all the debts due from the firm, and also for the indemnification of Cherry against the same. A bond was given by Seymour to Cherry accordingly ; in which bond J. Garrow and two other persons joined as sureties for Seymour. At the same time Cherry conveyed to Seymour, in fee, the undivided half of the several lots owned by the parties jointly, subject to the mortgages thereon ; specifying as to each lot the mortgage thereon, the persons by whom and to whom the same was given, and the amount due. And by the conveyance Cherry agreed to warrant and defend the premises against all incumbrances thereon, created by him, except the mortgages therein before mentioned. That conveyance was duly recorded, in March, 1834. About two years afterwards, Seymour conveyed the lot previously mortgaged to Monro & Jones by Cherry & Seymour, to the defendant S. Beardsley ;

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with covenants of seisin and warranty and against incumbrances.

In August, 1838, Jones being then dead, and Seymour being insolvent and having removed from the state, Monro informed Beardsley that he was about to proceed to collect his debt, by a foreclosure of the mortgage, which then belonged to him as the surviving mortgagee. Whereupon Beardsley agreed that if he would bring a suit upon the bond, instead of proceeding against the mortgaged premises for the collection of the amount then remaining unpaid, he would advance him \$100, and the residue of the mortgage in January thereafter. And in pursuance of that arrangement, a suit was commenced against Cherry upon the bond, in the supreme court; and a rule *nisi* for judgment by default was entered on the 15th of January, 1838. The amount then remaining due upon the bond and mortgage, including interest and the costs which had arisen in the suit upon the bond, was about \$556. And on that day Cherry applied to Monro and tendered him the amount due upon the bond and mortgage, with interest and costs, and required of him an assignment of the bond and mortgage to a third person; so that he might enforce the collection thereof against the mortgaged premises, which, in equity, were primarily liable for the payment of the debt. He also tendered to Beardsley an assignment of so much of the bond of indemnity, which he held against Seymour and his sureties, as should be a fair proportion thereof, in reference to the amount due upon this bond and mortgage, and the amount which he should be obliged to pay on account of other debts which, at the time of the dissolution of the partnership, Seymour had agreed to pay and indemnify the complainant against. Monro refused to receive the money and make the assignment. And the complainant thereupon filed the bill in this cause for relief; and obtained an injunction to restrain Monro from proceeding in his suit at law to collect the amount from the complainant or his property. The cause was heard on pleadings and proofs as to Monro and Beardsley, and upon the bill taken as confessed against Seymour the absentee.

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The vice chancellor, by his decree, authorized the defendant Beardsley to elect to have an assignment of the bond and mortgage, to protect his title to the mortgaged premises, upon payment of the amount due to *Monro*; but made the injunction perpetual against proceeding at law upon the bond. And if Beardsley should not elect to pay the amount, and take an assignment upon those terms, the defendant *Monro* was directed to cancel the judgment, which he had caused to be entered up after the tender to him on the 15th of October, 1838, and to assign the bond and mortgage, in trust for *Cherry*; so that the collection thereof could be enforced for his benefit, against the mortgaged premises, upon payment by *Cherry* of the amount remaining due upon the mortgage, and interest, and the costs in the suit at law. The decree also charged *Monro* and Beardsley with the costs of the complainant in this suit.

P. G. Clark, for the appellants. Beardsley has a freehold estate of inheritance in the premises mentioned and described in the deed, from Seymour to him, of August 3, 1836, and recorded on the 3d of the same month. That deed conveyed to the grantee an absolute and unconditional fee in the land therein mentioned. The qualifying clause related only to the covenants, and not to the estate conveyed. The deed, under any construction, is at least as effectual as a quit claim deed. Such a deed would convey a fee. The bond and mortgage being given to *Monro* & *Jones* to secure a debt due from Seymour & *Cherry* jointly at the time of the execution of the bond and mortgage, Seymour & *Cherry* were both principals at that time, and not sureties for each other. *Cherry*, therefore, was not a surety for Seymour as to that debt. The subsequent agreement, between Seymour & *Cherry*, cannot reach back and attach itself to the original agreement. *Cherry* still holds the same relation to *Monro* & *Jones* that he always did. They were not parties to the subsequent agreement between Seymour & *Cherry*; and therefore were not affected thereby in any way whatsoever. Before that agreement, *Monro* & *Jones* had a right to sue upon the bond, and they still have that right

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The obligation resting upon Seymour, as between him and Cherry, to pay the bond and mortgage to Monroe and Jones, is a matter of contract, and not of equity. The agreement is, like any other agreement, to be enforced by an action at law. Independent of that contract, Seymour is under no obligation to Cherry to pay that bond and mortgage. Cherry has no claim upon Seymour. The undertaking of the latter, then, is matter of contract and not of equity; and like all other contracts it must be enforced at law, and not in equity. Cherry has no greater right to ask the interference of this court in assisting him to enforce the contract between him and Seymour, than he would have in respect to any other contract. He must rely upon his contract; and, if there is any breach of it, he must enforce his remedy at law, and not in equity.

The right of subrogation exists only between the parties and privies. Had the debt to Monro & Jones been originally the individual debt of Seymour, and had Cherry signed the bond as surety only, if the property mortgaged had originally belonged to Seymour, and Cherry had refused to sign the bond unless Seymour would secure it by a mortgage; and the bond and mortgage had been executed and delivered upon these conditions, and Seymour had afterwards sold and conveyed the premises to Beardsley; yet Cherry would not have had any right to be subrogated in the place of Monro & Jones, as against Beardsley, without showing that Beardsley knew of the equities existing between Seymour & Cherry, at the time he purchased of Seymour. Beardsley being a bona fide purchaser, Cherry would have no superior equity over Beardsley; for in such a case, the law leaves him in possession who already has it. The records in this case furnished no such evidence. The recording act only makes the record notice of a conveyance, or of an incumbrance upon the title. It is not made evidence of any covenant contained in the deed or instrument recorded. It is not evidence or notice of any agreement, in relation to the payment of incumbrances. If the deed from Cherry to Seymour had contained a clause expressly providing that the mortgage mentioned should be collected out of

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the mortgaged premises, and that the bond should not be sued until after a sale of such premises, stating that Cherry was only surety for Seymour, the record would not have been notice of that fact to Beardsley; but the complainant would have been bound to show notice in fact. There is no such thing as constructive notice, under the recording acts. (*See 2 R. S. 746, 2d ed. 1 R. L. of 1813, 370, § 4. 1 John. Ch. Rep. 566.*)

If the record is evidence of covenants and agreements, which we deny, the deed from Cherry to Seymour, does not state that Seymour was to pay up the bond and mortgage. Nor does it show who was principal, or who was surety for the original debt. For aught that appears upon the face of the deed, the bond and mortgage was given to Monro & Jones to pay an individual debt of Cherry. At any rate, there is nothing in the deed which shows that Cherry is a surety for Seymour. And Beardsley having, at the time of the purchase, no notice in fact as to who was to pay the debt to Monro & Jones, had a right to infer that the rule of law applicable to all other cases would be applied to this. He had a right to purchase under the legal presumption that the bond was the principal debt, and that the mortgage was a mere collateral instrument, a mere security for the payment of Seymour & Cherry's bond. In other words, that by purchasing the land, he only stood as surety for Seymour & Cherry, and that the land conveyed to him could only be reached in case of the failure of Monro & Jones, to collect the bond from the makers. He had a right to suppose that, if the holders of the bond and mortgage should attempt to foreclose the mortgage before suing the bond, he would have a right to be subrogated in the place of the holders of the bond and mortgage; to enable him to sue upon the bond before any resort could be had to the mortgaged premises. (*Green v. Hart, 1 John. Rep. 580. Neimcewicz v. Gahn, 3 Paige's Rep. 630.*)

If Cherry has a right to be subrogated to the rights of Monro & Jones, that is, to stand in their place, they must be placed in his. The parties must change places entirely. Cherry should, therefore, have averred in his bill, that he tendered the bond

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given to him by Seymour upon the dissolution of the partnership, to Beardsley. This is an important averment ; and he has neglected to make it.

Monro cannot be compelled to assign the bond and mortgage to Cherry. Beardsley had a right to pay up the mortgage and hold the bond as an outstanding claim against Seymour. The complainant, therefore, asks for too much. The most that he is entitled to, under any circumstances, is a perpetual injunction as to any execution against him, upon the judgment recovered on the bond. The fact of Seymour's solvency does not affect the question of right. Again ; Seymour was improperly made a defendant. He has no interest in the question before the court. His rights will not be affected, whether the bill is sustained or dismissed. There is, therefore, a misjoinder of defendants.

For these reasons, the decree of the vice chancellor should be reversed ; and the complainant's bill should be dismissed, with costs.

L. H. Sandford, for the respondent. *First*, as to the defendant's appeal. The complainant, on conveying his half of the premises to Seymour, subject to the payment of the whole mortgage given to Monro & Jones, became a surety for Seymour in regard to the debt due to Monro & Jones. The defendant Beardsley had notice of Cherry's being such surety, when he purchased of the defendant Seymour. He bought the land, which, in equity, was the fund primarily liable for this debt, subject, of course, to all the liens and equities which he knew of, or which would have been exhibited to him in tracing his title to his grantor Seymour ; or which the records of that title displayed. (*Jumel v. Jumel*, 7 Paige, 591.) The complainant, therefore, on paying the debt to Munro, was entitled to be substituted in his place, and to have the benefit of the mortgage, to enforce it against the land. And in equity, he could require the mortgagee to pursue his remedy first against the mortgaged premises. (1 *Story's Eq.* 477, § 499. *Id.* 588, § 633, 634. *Hayes v. Ward*, 4 *John. Ch. Rep.* 123, 129. *Loud*

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v. *Sargeant*, 1 *Edw. Ch. Rep.* 164. *Neimcewicz v. Gahn*, 3 *Paige*, 613. *S. C.* 11 *Wend.* 312. *Jumel v. Jumel*, 7 *Paige*, 591. *Cox v. Wheeler*, *Idem*, 248. *Palmer v. Foote*, *Idem*, 437. *Heyer v. Pruyn*, *Idem*, 465. *Rodes v. Crockett*, 2 *Yerg. Rep.* 346. *Groves v. Graves*, 1 *Wash. Va. Rep.* 1. *Copis v. Middleton*, *Turn. & Russ.* 229.) The complainant offered to the defendants Beardsley and Monro, all and more than he was entitled to. He was not bound to offer to Beardsley any interest in his bond of indemnity. The sureties in that bond had a right to require the mortgaged premises, the primary fund, to be exhausted before calling upon them.

The decree is right in directing Monro to cancel the judgment and assign the bond and mortgage for the complainant's benefit, on being paid the amount due thereon. And it was also correct in charging the defendants with costs; they having combined together to compel the complainant to make the inequitable payment in question. (*Webster v. Wise*, 1 *Paige*, 319. *Hume v. Norton*, *Hopk. Rep.* 344.) Seymour also was a proper party to the suit. (*Hallett v. Hallett*, 2 *Paige*, 15. *Covenhoven v. Shuler*, *Idem*, 122. *Bailey v. Inglee*, *Idem*, 278.) But even if he was not, Monro and Beardsley cannot make the objection. (*Story's Eq. Pl.* 194, 198, 203. *Butts v. Genung*, 5 *Paige*, 254.) The decree, upon the merits, should therefore be affirmed.

Second; as to the complainant's appeal from the order suppressing the testimony of the complainants as to the tender of a transfer of a proportional interest in the bond of indemnity. This is not the case of an answer denying the case made by the bill, and admitting a different case which, if stated in the bill, would entitle the complainant to relief. Here the complainant's bill is admitted; and a collateral matter is set up to ward it off, which the complainant can rebut, in an instant, by proof which, from its nature, could not be a surprise upon the defendant; which was not pretended. It is like the defence of bona fide purchase without notice; which defence the complainant may meet by proving notice. (2 *Dan. Ch. Pr.* 408.) The replication puts this matter in issue. We wanted no dis-

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covery, and it was not necessary therefore to amend our bill (*Griffith v. Griffith*, 1 *Hoff. Ch. Rep.* 153, 165. 1 *Dan. Ch. Pr.* 513. 1 *Hoff. Ch. Pr.* 43. *Matthew v. Hauburj*, 2 *Vern.* 187. *Attwood v. —*, 1 *Russ.* 353. *Hughes v. Garner*, 2 *Younge & Coll.* 328.) Again; the order suppressing testimony, if otherwise correct, should have distinctly specified the portions intended to be suppressed, and it should have included the defendant's cross-examinations, and other testimony on the same subject; which was more voluminous than the complainant's examination.

THE CHANCELLOR. If Seymour had been within the jurisdiction of the court, so that he could have been personally served with process, the defendant Beardsley probably would have had a right to insist that he should be made a party, for his benefit. For, in that case, Beardsley might have been entitled to a decree that Seymour should pay off the mortgage, so as to relieve the premises from the lien thereof. The complainant too, in that case, would have had an interest in making Seymour a party. For he would have been entitled to a personal decree against him, in the first instance, to pay off the mortgage; so as to relieve the complainant as well as Beardsley from the payment of the debt for which they each stood in the situation of a surety for Seymour. But as he was an absentee, and had no property in this state which could be reached and applied to the payment of this demand, he probably was not a necessary party for any purpose. (*Bigelow v. Bush*, 6 *Paige's Rep.* 343.) One defendant in this court, however, cannot object that another defendant, having no interest in the subject matter of the suit, is improperly made a party. (*Welf. Eq. Pl.* 281. *Crane v. Deming*, 7 *Conn. Rep.* 387. *Butts v. Genung*, 5 *Paige's Rep.* 256.) It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur, upon the ground that the other defendants are improperly joined with him in the suit.

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The decree of the vice chancellor upon the merits, is clearly right. It is wholly immaterial whether, at the time of giving the bond and mortgage, the land or the bond was the principal security for the debt. For the agreement between Cherry & Seymour, upon the dissolution of their copartnership, and the conveyance of Cherry's undivided half of the mortgaged premises, constituted the relationship of principal and surety, not only between the parties personally, but also in reference to the interest of Seymour in the mortgaged premises. After that arrangement had been made, and the interest of Seymour in the mortgaged premises had been thus conveyed, the equitable rights of the parties to that transaction were the same as though Seymour had owned the whole lot originally, and had mortgaged it to secure his own debt, and Cherry had joined with him in the bond for the same debt, as a mere surety. Had that been the real form of the transaction originally, no one can doubt, that as between the owner of the equity of redemption in the mortgaged premises and the surety in the bond, the land would be the primary fund for the payment of the debt. And if the surety should be called upon by the mortgagees for payment, he would have the right to be subrogated in their place; and to their remedy against the land, for the payment of the debt.

Nor did it make any difference as to the equitable right of the complainant to subrogation to the remedy of the principal creditor against the mortgaged premises, that a bond of indemnity had been given to him by Garrow and others. For as Seymour was insolvent, his sureties in the indemnity bond had an equitable right to insist that Monro, the surviving mortgagee, should resort to the mortgaged premises for payment; instead of collecting it from Cherry, and thereby charging the debt upon them as the sureties of Seymour in the indemnity bond. To understand the rights of Cherry and the sureties in the indemnity bond, in reference to the primary liability of the mortgaged premises for the payment of the debt for which the mortgage was given, it is necessary first to contemplate them as they existed immediately after the conveyance of the 10th of August,

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1834, and the giving of the indemnity bond of that date ; and then to see if their equitable rights, as sureties, have been lost by the subsequent conveyance of the mortgaged premises to Beardsley.

At that time there was a debt due to *Monro*, as surviving mortgagee, from *Seymour* as the principal debtor, for the security of which debt *Monro* held a recorded mortgage upon land which then belonged to such principal debtor. He also held a bond for the same debt, in which *Cherry* stood in the situation of a mere surety of *Seymour* ; and *Cherry* held the bond of *Garrow* and others also as sureties of the principal debtor, to indemnify *Cherry* against being called upon for the payment of the debt due from *Seymour*, the mortgagee. Had *Monro*, at that time, attempted to collect his debt by a suit upon the bond against *Cherry*, instead of resorting to the mortgaged premises which belonged to the principal debtor, can any one doubt that *Garrow* and the other sureties in the indemnity bond, who were bound to protect *Cherry* against the consequences of such a suit, would have had a right to demand a transfer of the bond and mortgage to them for their protection and indemnity, upon advancing the money then due thereon ? And if they had the right and neglected to do so, *Cherry* himself would have had the same right to a transfer of the mortgage, for his own indemnity. For he was not bound to rely upon the sureties in the bond of indemnity ; who were only secondarily liable as between them and the owner of the premises, which were primarily liable for his indemnity under the agreement and conveyance of the 10th of August, 1836. It must also be recollected that *Cherry* held that bond of indemnity as his security against the payment of debts, to the amount of \$8,000, due to the mortgagees of other lots ; his half of which lots were conveyed to *Seymour* at the same time. And as the penalty of the indemnity bond, to protect *Cherry* from liability to the mortgagees for all those debts, and to indemnify him against the debts of the firm, was but \$3000, it is perfectly evident that all the parties to the arrangement made at the time of the dissolution of the partnership, must have understood that

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the several lots which were conveyed to Seymour, subject to the mortgages thereon, were to be primarily liable for the payment of the debts which were secured by mortgages upon those lots respectively.

The deed from Cherry to Seymour, under which Beardsley derived his title to the premises in question in this cause, showed upon its face that there was a mortgage upon the lot, to Jones and Monro, of about \$1900, and that the premises were conveyed subject to that mortgage. This would have been constructive notice of the mortgage, and of the equitable right of Cherry to have the debt charged upon the mortgaged premises, as the primary fund, even if the mortgage itself had not been upon record. But this is not a case in which a notice of the prior equity of Cherry, and of the sureties in the indemnity bond, was necessary to preserve their rights. For Beardsley did not and could not claim any strictly legal right to have the debt charged upon the complainant personally, instead of upon the lot on which it was charged by the mortgage. And as between mere equitable claims, he who is first in time is superior in right. Cherry had done nothing to impair his equitable claim to have the debt charged upon the interest of Seymour in the land which was primarily liable for the debt secured by the mortgage. And if Beardsley, at the time of his purchase, had inquired of the complainant, or of the surviving mortgagee named in the deed of Cherry, as a prudent purchaser ought to have done, instead of relying upon Seymour's representation that the incumbrances were paid, or upon his covenant against the incumbrances, he would have ascertained the true state of the facts. The subsequent attempt, therefore, of these defendants to defeat the prior equity of the complainant, by charging this debt upon him personally, was inequitable and unconscientious. And the vice chancellor would have done the defendant Monro no injustice if he had refused to allow him for the \$30 costs which he had improperly made in the action at law upon the bond. For it is evident that the action upon the bond was not brought for the sole purpose of collecting his debt, but for the

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improper purpose of charging it upon the surety person:ll/, and relieving the mortgaged premises from the lien of the mortgage.

Even if *Monro* was ignorant of the complainant's equitable rights when the action at law was commenced, he could not have been ignorant of them when the bond of indemnity was shown to him, and the amount due, and the costs, were tendered, and he was requested to assign the bond and mortgage for the protection of the complainant and to enable him to obtain repayment out of the mortgaged premises. The vice chancellor, therefore, very properly charged *Monro*, as well as *Beardsley*, with the costs of this litigation.

It was not necessary for the protection of the rights of *Beardsley* that he should have the benefit of the bond as against *Seymour*. For if *Seymour* should ever be worth any thing, he would be directly liable to *Beardsley* upon the covenants in his deed. The decree, so far as it is appealed from by the defendants *Monro* and *Beardsley*, must therefore be affirmed with costs.

Upon the matter of the cross-appeal, I think the decision of the vice chancellor was wrong. The defendants gave notice of a motion to strike out all the testimony, on the part of the complainant, which had been objected to before the examiner. This embraced a great portion of the testimony of the complainant which was clearly relevant and proper, to show that *Seymour* was insolvent, and that his property had been sold upon executions against him for its full value ; and to prove the exhibition, to *Monro* and *Beardsley*, of the indemnity bond, showing distinctly the equitable rights of the complainant ; and the production of papers which they were requested to sign to give effect to such equitable rights upon the payment of the money tendered by him. Yet the complainant was charged with the costs of that motion, in the final decree, because the vice chancellor thought it was not necessary for the complainant to prove that, in the offer which he made to the defendants, he consented to give *Beardsley* an interest in the indemnity bond if it could be any benefit to him. As the substance of the motion was denied, it was not proper to charge the complainant with costs

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even if the decision was right as to the immaterial part which was granted. I think the decision was wrong, however, in granting any part of the application. As the sureties in the indemnity bond had an equitable right to insist that the debt should be charged upon the mortgaged premises as the primary fund, it was not necessary that the complainant should tender to Beardsley an interest in that bond. But that tender having been made, at the same time, and as a part of the offer which it was necessary for the complainant to show, for the purpose of putting the defendants clearly in the wrong, and charging them with the costs of the litigation, it necessarily became a part of the proofs in the cause, and could not be separated from the rest of the transaction. The whole motion, therefore, should have been denied; and the costs of opposing it would have been properly taxable against the defendants as costs in the cause. The part of the decree which was appealed from by the complainants must therefore be reversed with costs.

SPERRY vs. MILLER and MILLER.

[Reversed, 8 N. Y. 336.]

A defendant in a bill of discovery, in aid of an action at law for the recovery of a debt, cannot plead payment of the debt, before the commencement of the action at law, in bar of the discovery sought by the complainant's bill. For that would transfer the trial of the action at law to the court of chancery; and that too without the power of deciding the case here, if the plea turned out to be untrue.

Where a bill is defective on its face, in consequence of the statement of facts which show that the claim of the complainant cannot be sustained, it is improper for the defendant to plead those facts in bar of the discovery or relief sought.

When the bill shows that the complainant has no right to an answer, for any purpose, the proper course for the defendant is to demur; instead of pleading a new fact in bar. For, upon the argument of a plea, either as to the discovery or the relief sought by the complainant's bill, the defendant cannot sustain his plea, in the court of chancery, by showing that the bill itself would have been bad upon demurrer.

In an action at law upon a joint contract, against two defendants, the plaintiff must succeed as to both, or neither of them; unless one of them sets up a matter of discharge which is personal to himself alone.

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THIS was an appeal from an order of the vice chancellor of the eighth circuit, overruling the plea of Henry Miller, one of the defendants, to the complainant's bill. The complainant brought an action of assumpsit against the defendants for a half-year's rent alleged to be due upon a lease for five years not under seal, from the complainant to the defendant Samuel Miller. The lease purported to have been signed by S. Miller as the lessee, and by H. Miller as security. The rent was \$130 a year, in semi-annual payments, but the first half year's rent was not payable until the end of the year, and the other payments were to be made every six months thereafter; so that the half yearly payments of rent were not in fact to be made until six months after the expiration of the half year of the term for which such semi-annual rent accrued, from time to time. On the second of April, 1846, S. Miller agreed to surrender the residue of the term; six months' rent then being due and payable for the half year of the term which expired on the first of October, 1845, and six months' rent having then accrued subsequent to the first of the preceding October; but which, by the terms of the lease, was not to become payable until the first of October thereafter. Before the last mentioned half year's rent had become payable, the action at law was commenced for the recovery of the half year's rent which accrued previous to the first of October, 1845, and which became payable on the first of April thereafter. The defendants appeared and pleaded the general issue, and the complainant, not being able to prove the execution of the lease by the defendant H. Miller, filed his bill in this cause to obtain a discovery of that fact from the defendants. The bill, which was filed subsequent to October, 1846, set forth this fact; and also stated that the complainant was about to commence another action at law for the recovery of the half year's rent which accrued between the first of October, 1845, and the first of April, 1846, and which had then become due and payable according to the terms of the lease.

To this bill the defendant H. Miller pleaded, in bar of the discovery sought, that the rent which became payable on the

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first of April, 1846, was paid before the bringing of the action at law, for the recovery thereof, and that before any other instalment of rent became due the complainant and the defendant S. Miller entered into the agreement of the second of April, 1846, set forth in the bill, by which the latter surrendered the residue of the term which had not then expired.

The vice chancellor decided that a defendant, in a bill of discovery in aid of an action at law for the recovery of a debt, could not plead payment of the debt before the commencement of the action at law, in bar of the discovery sought by the complainant's bill; as that would transfer the trial of the action at law to the court of chancery. He therefore overruled the plea on that ground; without examining other grounds of objection to the same.

N. Paine, for the appellant.

M. S. Newton, for the respondent.

THE CHANCELLOR. The plea is defective in form; as it sets up, as a part of the matters of fact which are pleaded in bar to the discovery sought by the bill, the same matters which are stated in the bill itself. The allegation that the six months' rent which accrued up to the first of April, 1846, and for which the complainant says he intends to bring an action, had not become due at the time S. Miller surrendered the residue of the term, on the second of April in that year, distinctly appears upon the face of the bill itself. If the payment of the rent for which an action had already been brought, therefore, was a valid bar to the discovery sought, and the surrender of the term was a discharge for the rent which had accrued for the next six months, but which had not become payable at the time of such surrender, the payment of the rent for which the action mentioned in the bill had already been brought, should alone have been pleaded in bar of the discovery. For if a bill is defective on its face, in consequence of the statement of facts

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which show that the claim of the complainant cannot be sustained, it is improper to plead those facts in bar.

When the bill shows that the complainant has no right to an answer for any purpose, the proper course for the defendant is to demur; instead of pleading new matters in bar. For upon the argument of a plea to a bill, either as to the discovery or the relief sought by the complainant, the defendant cannot sustain his plea, in this court, by showing that the bill itself would have been bad upon demurrer. (*Cozine v. Graham*, 2 Paige, 177.) The vice chancellor, therefore, if the plea of payment was not a bar to the discovery for any of the purposes for which it was sought by the bill, very properly declined to give an opinion upon the construction of the lease set out in the bill; and the liability of the defendant, Henry Miller, thereon as surety, notwithstanding the surrender of the lease for the residue of the term.

Upon the question, whether the payment of the rent, for which the action at law was brought, could be pleaded in bar to the discovery sought in aid of that action, I have not been able to find any decision, either in this state or in the courts of our sister states. But in the English court of chancery, more than sixty years since, Lord Thurlow decided that such a plea to a bill of discovery could not be sustained. (*Hindman v. Taylor*, 2 Bro. C. C. 7. 2 Dick. Rep. 651, S. C.) His decision in that case is entitled to the more weight because his first decision, that the plea was bad, was affirmed by him upon a re-hearing. And his lordship also stated that he had consulted with the master of the rolls, Lord Kenyon, and with several of the judges, on the subject; and was confirmed in his opinion that the allowing of the plea would be trying the bar, which was most proper to be tried at law. It is true, Mr. Beames questions the correctness of this decision; but it is upon his own authority merely. And it is referred to in a very recent and excellent English work on equity pleading, as an existing rule of pleading in England at this time. (*Welf. Eq. Plead.* 135.) It appears to be founded upon the principle that the existence of the indebtedness is the very matter to be tried, as

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a matter of fact, in the action at law ; and that the defendant cannot draw the trial of the same fact into this court to be litigated, by pleading it in bar of a discovery of facts to show the indebtedness, to be used upon the trial of the action at law.

Thus, in the case under consideration, the general issue, which has been pleaded in the action at law, puts in issue the existence of the debt at the time of the commencement of the action, as well as the fact of the signing of the lease by the appellant. And if an issue should be taken on this plea of payment in bar of discovery, and such issue should be found for the complainant, and a discovery of the signing of the lease should then be obtained by the examination of the appellant upon interrogatories, it would still be necessary to proceed at law and try the same questions over again there. For even if the decision of this court that the plea was untrue in fact, could be set up as an estoppel against this appellant, upon the trial of the action at law, it would not estop the other defendant from proving payment, as a defence to that action. And that defence would, of course, defeat the recovery as to both defendants. For, in an action upon a joint contract against two or more defendants, the plaintiffs must succeed as to all or neither of them ; unless one of them set up a matter of discharge which is personal to himself alone.

The order appealed from must, therefore, be affirmed with costs.

MOORE vs. DES ARTS.

[Affirmed, 1 N. Y. 359.]

The defendant imported into New-York a quantity of spelter, upon which the collector claimed and received a duty of 20 per cent ad valorem ; which spelter was not a dutiable article, being included in the class of articles exempted from the payment of duties, under a different name. He subsequently sold such spelter to the complainant, at *long price*, which by custom was a sale of the vendor's right

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of debenture, where such right existed. Afterwards, while the spelter remained in the hands of the purchaser, and in a situation in which it might have been exported with the benefit of drawback had it been a dutiable article, the secretary of the treasury decided that spelter was exempt from duty; and directed all duties which had been previously received, on the importation of that article, to be refunded to the importers; in pursuance of which decision and direction the defendant received back from the collector the 20 per cent duty, which had been paid by him, upon the importation of the spelter in question; although the plaintiff claimed it as belonging to him; *Held*, that the duties thus refunded belonged to the importer and not to the vendee of the article on which duties had been wrongfully charged; and that such vendee could not compel the defendant to pay the refunded duties to him.

Held also, that the court could not, from the alleged custom of trade at New-York, and from the fact that the sale was at *long price*, make an agreement for the vendor that the vendee should have the benefit of debenture upon a sale of goods which were by law free from duty; or an agreement that if the vendor should succeed in recovering back the amount wrongfully received by the collector, for duties, the purchaser should be entitled to the money thus recovered.

Distinction between a sale at *long price*, and a sale at *short price*, according to the usages of trade at New-York.

It is a reasonable presumption, that those who are dealing in articles of commerce, especially those who purchase by wholesale from the importers, are acquainted with the different names by which such articles are known to the commercial world.

THIS was an appeal, from a decree of the vice chancellor of the first circuit, overruling a demurrer to the complainant's bill. The case, as stated in the bill, was as follows:

In February, 1844, the defendant imported into New-York, from Hamburgh, a quantity of spelter in plates, upon which the collector claimed and received a duty of twenty per cent ad valorem; amounting to \$565. This spelter was not a dutiable article under the act of August, 1842, being included in the class of articles that by the ninth section of that act were exempt from the payment of duties; not by the name of spelter, but by the name of tutenague, or teuteneque as it is spelt in the seventh subdivision of that section. Had it been a dutiable article it would have been entitled to debenture; and to a drawback of the whole amount of the duty, except two and a half per cent thereof; upon an exportation at any time within three years.

By the usages of trade at New-York, as the bill alleged

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merchandise entitled to debenture is sold at two different prices, called *long price* and *short price*. The first entitles the vendor to have the goods exported by the vendee within the time allowed by law, so as to give the importer the benefit of the drawback, or the payment of an additional price, equal to the amount of the duties, in case the goods are not exported. The second, or *short price* entitles the first, or any subsequent vendee, to the benefit of the drawback, in case he exports the goods within the time and in the manner allowed by law to entitle the importer to receive such drawback at the custom house.

A few days after the importation of the spelter, by the defendant, and the payment, to the collector, of the twenty per cent duty claimed to be due thereon, the defendant, by his authorized agent, sold such spelter to the complainant at *long price*, and delivered the same to him. In September, 1844, while the spelter remained in the hands of the complainant, and in a situation in which it might have been exported with the benefit of drawback, had it been a dutiable article, the secretary of the treasury decided that this article was exempted from duty; by the ninth section of the act of 1842. He thereupon authorized and directed the several collectors of the custom to refund to all importers of spelter, under that act, who had paid duties thereon, the amount of the duties thus paid by them respectively. And in pursuance of that direction the defendant received back, from the collector, the twenty per cent duty which the latter had claimed and received from him upon the importation of the article in question; although the complainant claimed the right to the return of such duty, and requested the defendant to authorize him to receive it.

The defendant having refused to pay over the amount thus received from the collector, the complainant filed his bill in this suit to recover the same. And the defendant demurred to the bill for want of equity; and also stated, as a ground of demurrer, that if the complainant was entitled to the money, he had a right to recover it in an action at law.

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D. Lord, for the appellant. The merchandize, spelter, was not in law dutiable, and so was not within the usage stated in the bill as to debenture goods. Both parties are to be deemed co-nusant with the commercial name of the article; and whether it was dutiable or not was a question of law merely. The parties contracting, with knowledge of the law and the fact, having been silent as to the sum which had been exacted as a duty, it is the vendor's money; and the vendee, without a contract for it, cannot claim it. A contract of sale merely, without any mistake of fact, or fraud, or any contract for the amount exacted, did not carry with it any obligation to refund any part of the supposed components of the cost of the goods.

Again; if the contract of sale, by its nature or the usage alleged, contains an agreement to refund any part of the cost, then the remedy is at law; there being neither trust, mistake, accident or fraud, and no ground of jurisdiction in this court for a discovery or an account.

H. S. Dodge, for the respondents. The demurrer was rightly overruled, and the order of the vice chancellor should be affirmed with costs. The case presented by the bill makes out a strong case in equity against the defendant. He has received money which in equity and good conscience belongs to the complainant; and he must be considered as holding it as a trustee for the latter. The complainant, by his purchase at the *long price*, paid the defendant the duties on the spelter and became entitled to the return of such duties if he exported the goods; or to obtain an equivalent for the duties by selling the spelter at the long or full price. The duties refunded by the government, without the exportation of the goods, belong to the complainant as his indemnity for the drawback which he has lost, and for the consequent fall in the market value of the goods. The complainant, by paying the *long price*, fully indemnified the defendant for the duties; and he is precisely in the situation, in equity, of an assignee of all the defendant's right to any return of or indemnity for the duties. His equity

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is like and equal to that of the complainant in *Randal v. Cochran*, (1 *Ves. sen.* 98.)

The event of the return of the duties, by the secretary of the treasury, was not in contemplation of the parties, and was not an act that could have been compelled by law ; but rested entirely in his discretion. (*Laws U. S.* 1839, p. 68, § 2. *Cary v. Curtis*, in *S. C. U. S.* Jan. 1845.) It cannot therefore be urged that there has been a mistake of law. The court will not suffer the defendant to retain an unconscientious advantage from such an unforeseen event ; and directly contrary to the spirit and intent of the contract. (*Quick v. Stuyvesant*, 2 *Paige*, 84. *Chase v. Barrett*, 4 *Id.* 148.)

The remedy at law is doubtful. If there is any, it is the equitable action for money had and received—an action which assumes a concurrent remedy in equity. The established jurisdiction of this court is never lost because courts of law adopt its principles ; and extend a remedy to cases formerly only cognizable in equity, by allowing this action for money had and received. (*Fonbl. Eq. B.* 2, ch. 1, § 1. 2 *Story's Eq.* 501, §§ 255, 1256. *Scott v. Surman*, *Willes' Rep.* 405. *Stratton v. Rastall*, 2 *Term Rep.* 366. *Pease v. Barber*, 3 *Caines' Rep.* 266. *Butler v. Wright*, 6 *Wend. Rep.* 290. *Wisner v. Bulkley*, 15 *Id.* 321. *Randal v. Cochran*, 1 *Ves. sen.* 98. *Weymouth v. Boyer*, 1 *Ves. jun.* 416. *Wright v. Hunter*, 5 *Id.* 792. *Kemp v. Pryor*, 7 *Id.* 237. *King v. Baldwin*, 17 *John. Rep.* 384. *Hawley v. Cramer*, 4 *Cowen's Rep.* 727. *McCrea v. Purmort*, 16 *Wend. Rep.* 460. *Varet v. N. Y. Ins. Co.*, 7 *Paige's Rep.* 561 ; *S. C. in error, by the name of N. Y. Ins. Co. v. Rowlet*, 24 *Wend.* 505. *Welsh v. Fremont*, 4 *Bibb's Rep.* 343. *Wilkins v. Woodfin*, 5 *Munf. Rep.* 183.) Besides ; the discovery and account sought for by this bill would be sufficient to authorize the suit to be retained, if there were any doubt about the jurisdiction of the court. (*Weymouth v. Boyer*, 1 *Ves. jun.* 416. *N. Y. Ins. Co. v. Rowlet*, 24 *Wend.* 505.)

THE CHANCELLOR. It is not alleged in the bill in this case that the complainant, at the time of his purchase, was ignorant

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of the fact that spelter, or zinc, or tutanag, or tutenague as it is sometimes spelt, was the same article that was exempted from duty, in the act of August, 1842, under the name of *teuteneque*. Nor does it appear that it was an article which was usually exported; so that its value would have been materially increased from its being entitled to debenture. Or that the complainant intended or expected to export it, or that he would have done so if it had in fact been entitled to drawback. All that is said, in the bill, on that subject, is that at the time of the publication of the decision of the secretary of the treasury, the article remained in the complainant's hands, and in a situation to be identified &c. in the manner required by law to entitle the owner of debentured goods to the benefit of drawback, provided they are exported within the time limited by the statute. I apprehend the only real injury which the complainant sustained by his ignorance of the law, was that he paid more for the spelter than it was actually worth. And that by the subsequent decision of the secretary of the treasury while the article remained in his hands undisposed of, the value of spelter was reduced about twenty per cent in the market.

The article not being dutiable, the alleged custom as to the sale of articles entitled to debenture, at the *long price*, and the rights of the parties upon such a sale, has no application to this case. For there is no allegation in the bill that the defendant represented that the spelter was a dutiable article, or that he had in fact paid duties thereon, or that the duties, if paid, had not been paid under protest. It is impossible, therefore, out of the alleged custom and the mere fact that the sale was at long price, for this court to make an agreement for the defendant that the complainant shall have the benefit of debenture upon a sale of goods which are in fact free from duty; or an agreement that if the vendor succeeds in recovering back the amount which has been improperly claimed and received by the collector, the purchaser shall be entitled to the money thus recovered.

It is a reasonable presumption that those who are dealing in articles of commerce, especially those who purchase by wholesale from the importers, are acquainted with the different names

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by which such articles are known to the commercial world. And if spelter was actually exempted from duty by the name used in the section of the statute relative to exempt articles, probably both parties to this sale had reason for believing that the claim made by the collector was unfounded; and that it would probably be reversed, and the duties be refunded to the importer. If so, the purchaser should have made his contract with reference to that event; so as to secure to himself the benefit of the refunded duty in case it should turn out that the collector was wrong. But he could not do this by simply purchasing according to a custom which had no application to such a case. On the other hand, if the term *teuteneque*, as used in the act of August, 1842, was wholly unknown to commercial men, and did not in fact designate the article imported by the defendant under the name of spelter, that fact should have been distinctly stated in the bill, if the complainant wished to show that the receiving back of the duties had deprived him of a right of debenture which actually existed, and to which he was entitled under his purchase of the spelter at *long price*.

In any view, therefore, which I have been able to take of this subject, I do not see that the complainant is entitled to the refunded duties, which the defendant has received under the order of the secretary of the treasury. Hence, it is unnecessary to examine the objection made in the demurrer, that the remedy of the complainant, if he had any, was only properly cognizable in a court of law.

The order appealed from must be reversed; and the demurrer must be allowed, and the complainant's bill dismissed with costs. But under the circumstances of this case, I must leave each party to bear his own costs upon this appeal; except as to the costs of entering the final decree, and the subsequent proceedings thereon.

APPENDIX.

CHANCELLOR KENT.

WHILE these sheets have been passing through the press *James Kent* has ceased to exist. Like a shock of corn fully ripe, he has been gathered by the universal Reaper, and has departed from among us, followed by the affectionate regard and the grateful recollections of an entire people; leaving to the world the example of a virtuous, well spent life, and to the members of his own profession a rich legacy in works of inestimable value, and of enduring fame. The learning, the ability, the wisdom, and the moral purity of the deceased, no less than the important public stations which he had filled—and more especially as the head of the court of chancery for nine years—require that some record of his death, and some notice of his life, should be made in this place. Yet nothing like an elaborate biography will be attempted. That is a task for abler pens than mine. Neither will *eulogy* be ventured upon. That has already been very satisfactorily accomplished in the subjoined addresses of Messrs. Hoffman, Butler, Lord and Maxwell; which may be regarded as singularly fine models of chaste, subdued, and touching eloquence. A brief sketch, however, of the leading events in the life of the venerable commentator on American law, may not be inappropriate. To essay some memorial of the kind seems due to the memory of the departed; to offer some tribute expressive of our common gratitude—to hang some garland, slight and unworthy though it be, upon that shrine—is the right as well as the duty of every member of the legal profession. For we have all drank at his “fountain of learning and of wisdom,” and been encouraged by his example, and benefitted by his labors.

JAMES KENT was born on the 31st day of July, 1763, in Fredericksburgh, then part of Dutchess, but now of Putnam county, New-York. He was the eldest son of Moss Kent, a graduate of Yale College, and who was admitted to the bar in Dutchess county, in 1756. James Kent entered Yale College in September, 1777. In July, 1779, New Haven was invaded by the British forces, the college broken up, and the students dispersed. During the suspension of his collegiate studies an incident occurred which determined his choice of a profession, and fixed the fate of the future chancellor. He met with a copy of Blackstone's Commentaries, which he read and admired; and at the age of sixteen he resolved to be a lawyer. He completed his academic course, and left college with a high reputation. He then entered the office of Egbert Benson, attorney general of New-York, where he prosecuted his legal studies until April, 1787, when he was admitted to the degree of counsellor of the supreme court. While a student, it is perhaps unnecessary to say, he was industrious, temperate, and regular in all his habits. The fact that he afterwards became a great lawyer, necessarily implies industry, temperance, and morality in the student. For no man ever yet built an enduring structure of legal greatness upon any other foundation.

In 1790, and again in 1792, Mr. Kent was elected by the people of his native county a member of the legislature. In 1793, he was nominated as a member of congress, but failed of his election by a few votes. He then removed from Poughkeepsie to the city of New-York; when he was appointed professor of law in Columbia College, and delivered a course of lectures the year following. In 1796, he was appointed a master in chancery. At that time there were but two masters in the state. The next year he was called to fill the office of recorder of New-York. On the 6th of February, 1798, he was appointed a judge of the supreme court, and thereupon removed to Albany. He then commenced the practice of delivering a written, well-reasoned opinion, supported by legal authorities, in every case decided by the court, of sufficient importance to become a precedent for the future. He seems to have thought it not enough that his decisions should be correct, but he recognized the right of the profession, and of the parties, to know the reasons upon which such decisions were founded. And, indeed, the force and the authority of all judicial decisions depend much upon the process of ratiocination in the judge's mind—the *modus operandi*, by which the result is arrived at, and the authorities which support it.

In the year 1800, Judge Kent, together with one of his associates

upon the bench, Judge Radcliff, revised the statutes of this state, by the direction of the legislature. In July, 1804, Judge Kent was appointed chief justice of the state; which office he held until the 25th of February, 1814, when he was appointed chancellor, after having sat, as judge and chief justice, in the supreme court about fourteen years. The opinions delivered by him while upon the bench of the supreme court, will be found in the two volumes of New-York Cases in Error, the three volumes of Caines' New-York Term Reports, the three volumes of Johnson's Cases, and the first eleven volumes of his Reports of the Supreme Court and of the Court for the Correction of Errors.

Chancellor Kent presided in the court of chancery upwards of nine years; making, with his previous service in the supreme court, an uninterrupted judicial term of about twenty-three and a half years; longer than any other on record in this state, with the exceptions of Chancellors Livingston and Walworth. By the constitution of 1777 the chancellor and judges of the supreme court could only hold their offices until they were sixty years of age. But the constitution of 1821 vacated the offices of the then chancellor and judges, as soon as their successors should be appointed. As Chancellor Kent would arrive at the age of 60 about seven months after that constitution went into effect, by an arrangement with his successor, Governor Yates withheld the commission of the latter until Chancellor Kent was sixty. Having reached that age on the 31st of July, 1823, his judicial life terminated. When he quitted the woolsack, he left no arrears of business behind him. Every cause which had been argued before him had been decided. The decisions made by him while chancellor are contained in the seven volumes of Johnson's Chancery Cases, and his opinions in the court for the correction of errors during that time, will be found in the last nine volumes of Johnson's Reports.

Upon the retirement of Chancellor Kent from the bench, the members of the bar in New-York and Albany took occasion to make public expressions of their respect for his judicial and private character, and of their gratitude for his public services. He removed to New-York; and in 1824, he became a second time law professor in Columbia College. In 1826, the fruits of his labors as professor appeared, in the first volume of his invaluable "Commentaries on American Law;" which contained the substance of the lectures delivered by him in that capacity. This great work extended to four volumes, and was completed in 1830; though it was greatly enlarged and improved by the author, in successive editions published from time to time during his life

Chancellor Kent was elected President of the New-York Historical Society in 1828, and was an original member of the Literary Association of Yale College, formed in 1780, under the name of the Phi Beta Kappa Society. In 1821, he, together with Ambrose Spencer and Abraham Van Vechten, represented the county of Albany in the Convention called to form a new State Constitution.

In 1785, Chancellor Kent married a daughter of Captain John Bailey, of Dutchess county, the sister of Gen. Theodorus Bailey, formerly United States senator, and afterwards postmaster of the city of New-York. She survives her husband, after enjoying with him more than three score years of uninterrupted domestic felicity. His family consisted of two daughters and one son, William Kent, formerly circuit judge of the first circuit, and subsequently Royall professor of law at Harvard University. Less than a year previous to his death, Chancellor Kent was one of the pall-bearers at the funeral of his friend Timothy Dwight and was then as erect, hale, and active as a man of fifty. At eighty four he was somewhat deaf, but his capacity for work was still wonderful, his conversation animated, and his temperament as cheerful and vivacious as when he was thirty years younger. He was unwell for but a short time previous to his death, which occurred on Sunday evening, December 12th, 1847, at the ripe age of eighty-four years and four months. The courts then sitting in New-York, adjourned, out of respect for his memory, and both boards of the common council adopted resolutions appropriate to the occasion.

He was an exemplary Christian, a steadfast friend, an affectionate husband and father, and a true patriot. He has left a character above reproach, and a fame not measured by time, nor limited by sectional boundaries. So highly are his works esteemed abroad, that the Lord Chief Justice of England, Baron Denman, wrote to Chancellor Kent some years since, acknowledging the indebtedness of the legal profession throughout the world, to him, for his able Commentaries.

A meeting of the bar was held in the city of New-York, a few days after his death, for the purpose of testifying their respect for the memory of their departed brother. On motion of Mr. Seth P. Staples, the Hon. Samuel Jones was called to the chair, and Judges Betts, Oakley, McCoun, Ulshoeffer and Ogden Edwards, and Messrs. David S. Jones, Sylvanus Miller, and William Johnson, were appointed vice presidents, and Messrs. B. Robinson, G. W. Strong, B. D. Silliman, and W. S. Johnson, secretaries.

Mr. OGDEN HOFFMAN (from a committee, consisting of Messrs. Staples, Duer, Hoffman, and Butler, appointed for that purpose,) offered

the resolutions which will be found below, and which he prefaced with the following remarks:—

Mr. President—Upon me, by the appointment of the committee, has devolved the duty of presenting to the consideration of this meeting, the resolutions, prepared by them, which I hold in my hand. The crowded gathering of the Bar—the presiding over it by you, our oldest and most respected member—the Judges of our Courts leaving their judicial seats, arresting the course of litigation, and uniting with their brethren of the Bar in this tribute of condolence and respect—attest that some mighty one has fallen—that the foremost of us has ceased to live—that JAMES KENT—and his name is his eulogy—that JAMES KENT is no more.

It is fit and proper that this tribute should be paid by the Bar of this State; for it is a proud thought—it is almost a consoling thought to *its* members—that in this State he was born—that in this State, under the guidance of the learned and excellent BENSON, he pursued his legal studies—that in this State his judicial career was run—and that here, in the midst of us, until yesterday, lived that fountain of learning and of wisdom, the streams of which have flowed into every State in our Union, and in whose waters the aspirants for legal fame throughout our land have laved their limbs, and been refreshed, invigorated, and prepared for their professional conflicts.

Appointed at an early age a Judge of our Supreme Court, he adorned the bench, by a series of decisions distinguished by profound learning, deep research, accurate discrimination, and spotless integrity. Transferred to the Court of Chancery, as Chancellor of our State, in a little more than nine years he accomplished an entire and wonderful revolution in our Courts of Equity, “and built up a system of jurisdiction and jurisprudence upon wise and rational foundations.”

Retired from the bench, his benefactions to the profession and his country still continued, and his “Commentaries,” distinguished alike by classic elegance and profound erudition, have become the text-book of the lawyer of our own land, and have called forth the eulogy, and guided the labors of the learned of other climes.

But brilliant as has been his career—splendid as have been his triumphs in the field of Jurisprudence, it is upon the “daily beauty of his life,” as a husband, a father, a friend, and at the domestic fireside which he so deeply prized, that I would love to linger, as adorning our profession and ennobling our calling. As a child I lived almost beneath his roof, and my earliest recollections are identified with a father's love, and admiration, and respect, for Judge KENT; and from

that hour to this, the ripening perception, and the maturing judgment, but deepened, as they increased, the respect and admiration of earlier years. I would love to linger upon the purity of his character—the truthfulness of his mind—the honesty of his purposes—upon the child-like simplicity of his manners—the trusting confidence of his friendships—the gushing tenderness toward those who had been his companions at the bar, and the sharers of his toils; a tenderness extended as I have known and felt, even towards their sons,—whose career he would watch and guide with a solicitude almost parental. I would love to linger on his devotion to the honor and character of our profession—upon the joy which every act or decision, that advanced and elevated it, would inspire—upon his honest and virtuous indignation at every deed that soiled the ermine of the Judge, or stained the gown of the Advocate. But this is not the time for eulogy. The Resolutions which I hold in my hand, contemplate that at some future time, justice shall be done to his character, his learning, his services, and his memory. His praise “must be hymned by loftier harps than mine.”

RESOLUTIONS.

Death has removed from the scene of his labors, one of our most illustrious citizens. The venerable JAMES KENT, for sixteen years a Judge, and for the greater part of that time the Chief Justice of the Supreme Court of this State, and for nine years its Chancellor, and since his retirement from public life, the learned Commentator on American Law, has finished his long and memorable career. The Members of the Bar of the city of New-York are desirous to testify the respect and affection, the veneration and gratitude in which they hold his virtues, his services, and his fame—therefore

Resolved, That the Members of the Bar of the City of New-York have received the intelligence of the death of JAMES KENT with emotions of deep sensibility, and that they doubt not that their feelings on this event will be shared by their brethren in the profession throughout the Union, and that all will unite in deploring the loss of him, who for a long series of years has been the *unquestioned head* of American Jurisprudence.

Resolved, That we shall not attempt to portray the private virtues of the deceased, nor to recount his public services; since the attempt to comprise, within the limits of a resolution, a just estimate of his labors and writings, his abilities and learning, his services, virtues and character, would of necessity be vain and abortive. They have already been placed, by the stamp of public approbation, beyond the reach of

detraction and of praise. Nor is his established fame confined within the limits of his native state or country. It extends wherever the English language is spoken or read, and the science of Jurisprudence is known and cultivated. To record the virtues of his unsullied life, to delineate and unfold his character and merits as a Judge, to exhibit and appreciate his peculiar excellencies as a Jurist and Author, and to dwell upon the influence that by his labors, his writings, and his example, he exercised upon the mind and character of the members of his profession, will be the province of the Historian and Biographer; and it is by the Historian and Biographer alone, that these duties can be properly discharged.

Resolved, That the Members of the Bar tender to the Widow and Family of the deceased their sympathy and condolence; that they will wear the usual badge of mourning; and that, with the permission of the family, they will join as a body in the ceremonies of the funeral.

Resolved, That a committee of three, to be nominated by the presiding officer of this meeting, be appointed to correspond with gentlemen in the different districts of the State, in order to an expression of the feelings of the Bar of this State at large, to be presented at the opening of the next term of the Court of Appeals.

Resolved, That a committee of five, to be nominated by the presiding officer, be appointed, whose duty it shall be to select some suitable person to deliver a public discourse to the Members of the Bar, on the life, character, and public services of the deceased.

Resolved, That a copy of these Resolutions be transmitted to the widow and family of the deceased.

Mr. B. F. BUTLER, on rising to second the resolutions remarked that he should endeavor to imitate in brevity, however he might fail to do so in other respects, the example of the friend by whom they had been moved. It had been truly said by him and in them, that to do any thing like justice to the character, services, and virtues of JAMES KENT was not within the limits of an occasion like the present. Besides—there are others who are entitled to share in the sad and yet grateful office, of scattering flowers on the bier of one so loved and honored.

I propose, therefore, Mr. President, only to glance at one of the elements which compose the admirably blended character, intellectual, moral, and professional, of Chancellor KENT—a single bright point in the brilliant cluster—and yet one which may well attract the gaze, and fix

the admiration of an assembly like this—*his career as a Lawyer*. His history in this respect, is identified with the history of American Law. Entering upon his professional studies, at the close of the Revolutionary war, under all the disadvantages attending the new and unsettled order of things, he witnessed the birth of our peculiar juridical systems and institutions. Endowed with uncommon quickness of perception, and with equal capacity for labor: imbued with the love of elegant letters; furnished with the best academic helps which the times afforded; and fired by a true professional ambition; he resolved to make himself a lawyer—a jurist—in the highest sense of the words. He resolved also, to do what he could to advance the interests of Legal Science, in his native land, to save it from the barbarism to which it was exposed; to liberalize its practice; to add to its usefulness and its glory. We say of other men, who, after gaining wealth and fame from the practice of the law, have applied themselves in the evening of life, to the illustration of Legal Science, that they do well in thus repaying the debt which every such man owes to his profession. But JAMES KENT, before he had incurred any such obligation, commenced on a broad and liberal scale his preparations for discharging it; he never fell in arrear; he was always in advance—a creditor rather than a debtor.

At the age of thirty—fifty-four years ago—he received from Columbia College the appointment of Professor of Law, and was only withdrawn from its duties, by the demands of the judicial stations for which his professional learning and his personal virtues soon marked him out. But neither the multifarious labors of the Bench, nor the distractions and perplexities incident to them, could withdraw him from his grand design. His opinions were just what was needed at the time—disquisitions, lectures, treatises on the particular questions discussed in them; they exhausted the whole learning of the common law; they were enriched by illustrations from the Roman civil code; they were adorned by the graces of a polished style; they were redolent with the odor of taste and scholarship. These opinions soon attracted universal attention; they were published with those of his brethren, whom they incited to honorable emulation; and New-York, before the era of her steamboats, her canals, or her other public works, became famous among her sister States, by the reported decisions of her Judiciary.

He was thus the teacher of the Bar; the instructor of other Judges, the luminary of American Law.

**"Hither, as to their fountain, other stars
Repairing, in their golden urns drew light"—**

Marshall and Parsons, Tilghman and Dessaussure, then in the zenith—Story, just risen above the horizon—and others of lesser size and brightness. After his retirement from the Bench, he resumed, at the age of sixty, in a form of more direct and permanent utility, his original purpose. The Commentaries on American Law are the fruit of his post-judicial labors. To say of them and of his other works, that they place him in the same rank with the Ulpian and Papinian of antiquity; the Bacons and the Cokes, the Blackstones and the Mansfields, the D'Aguesseaus and the Pothiers, of modern times, is but to express the unanimous judgment of our profession.

I forbear, sir, to speak of his private virtues, farther than to remark, that while they were in keeping with the intellectual elevation and dignity of his character, they were blended with so much of kindness and simplicity, that none knew him but to love, nor named him but to praise. To the last hour of my life, I shall remember, and I would fain hope, profit by, the lessons of instruction which he, though holding the highest judicial office in the State, did not disdain to give to me, an unknown and humble student; the words of encouragement with which he cheered my first efforts at the Bar; the assurances of confidence and regard which I have received from his lips.

But why should I pursue a train of remark, which must necessarily fall short of the feelings which swell the bosoms of all who hear me? Full of years and full of honors; in the ripeness of his powers and of his fame; "ere yet Decay's effacing fingers" had swept from his mind its stores of thought and feeling, or ungently touched his venerable brow; happy in the retrospect of a long protracted life; devoted to the last, to the first of human sciences; still more happy, let us reverently hope, in the prospects of futurity opened to him by the Christian faith—he has finished his mortal career. But his works will live so long as the government and laws which they illustrated shall endure, so long as jurisprudence shall be cultivated; so long as the language he employed shall be spoken among men.

While all classes of our people, in all appropriate methods, will give utterance to the sentiments of respect, esteem and veneration in which they held him, it is the peculiar duty; it is the high honor of the professors of that science to which his life was given, to claim him as their own; to celebrate his virtues as among the most pleasing of tasks; to cherish his memory as the most precious of their possessions

Mr. DANIEL LORD next addressed the meeting, and said :

Mr. President and my professional brethren : Were it on a theme less prolific or on a topic of a different kind, silence would best become those who have listened to my friends who have just sat down. But we are met in truth to commemorate the extraordinary character of one who seems to have fulfilled, in the amplest manner, every promise which a man could make to his friends, to his profession, or to his country. It commands our attention and compels our applause, and in relation to him in whose honor we are met, those who shall erect his monument will not need the symbol of a broken column : they will present it as perfect, in all its just and beautiful proportions, and so continuing, until its final and complete removal from our sight.

For such a man the age had called. The field of his services was great and extraordinary. He was appointed a Judge of the Supreme Court of this state in 1798, and his introduction into that high office was under great auspices. He was placed there by Gov. Jay—the patriot—the statesman—the pre-eminent lawyer of his country. When Judge KENT entered upon the duties of his office, it was under institutions formed and owing their origin to a revolution, and still fresh and unconsolidated. The American revolution had taught our countrymen, in throwing off their subjection to England, to drop in a great degree their deference to authority, to precedents and to antiquity. The French revolution, in that convulsion which it had created, and which had almost shaken the solid globe itself, had spread its effects upon this country. It had unsettled, not only maxims of government, but those of the social institution itself ; it had diffused every where controversies on the very foundations of all government, of all society ; it had excited a degree of party violence and of political animosity and bitterness of which we, in more recent days, have had no parallel, and of which we can form but a faint idea ; and the wars and commotions which grew out of the troubles of Europe, presented commercial as well as political questions of the gravest weight and of exceeding difficulty. It was in the midst of this scene of turmoil and of tempest that the Judge was called to act ; and this he was bound to govern, at the early age of thirty-six—a period when those of our profession who are most successful begin its real responsibilities.

He was then called on to apply to our forming law the maxims of the English jurisprudence, our birthright,—the system of time-honored usages, adopted by a free people under popular institutions, but which had grown old and of difficult application to a people really but just clearing up the wilderness.

If the field was great and difficult, our admiration is warmed at the contemplation of those who labored in it. The Bar who surrounded the court in that day, our honored predecessors, were men not to be forgotten. There was the sagacious, the complete Hamilton—the honest-minded Pendleton—Harison, the learned, the elaborate—Hoffman, that ingenious, polished master of the advocate's art—the deeply learned, wide-searching Riggs; these were the Bar over whom this youthful Judge was to preside, the conflicts of whom he was to govern, upon whose arguments he was to decide.

And, coming to a later period, there was a scarcely less brilliant array of mighty spirits. Not daring now to name the living, now present with us, (and long may it be before it shall be allowed to us in this way to name them,) let me bring up to your view Emmet whose enlarged and extensive learning was equaled by his childlike simplicity of heart—Colden, the polite scholar, the speculative philosopher, the able lawyer; also that model of all that is venerable in our memory, Van Vechten, whose teeming eloquence was Ciceronian, and charmed every heart; the terse, the highly gifted Henry; the younger Jay, full to abounding, in every noble trait; and that union of scholar, lawyer, orator and gentleman, John Wells. These were the men whom the times brought forth, and who reflected and also gave an illustrious light.

Look also at the Bench during the period of which we speak. The ingenious, polished Livingston; the sound and judicious Radcliff; Thompson, the honest, steady and stanch friend of all that was true and just; Van Ness, the accomplished man of genius; Platt, the sedate, the sober-minded; and last, him, who in every trait and lineament, in every part and member, was every way a giant, Spencer. With these associates, as competitors and coadjutors, did Judge KENT dispense justice. To whom of them all was he unequal? Shall we speak of his learning in the common law, of his researches in the commercial law of continental Europe, of his profound views of the constitutional and organic law of our own country? They are too well known to you all for me to name them now. They called for power of the highest order, and proved the greatness of the man.

Elevated to be Chancellor, he found the law of equity in a great degree unestablished. Here was a position indeed of trial. He was aided by no jury to take from him the responsibility of deciding on facts and intentions. He had no associates on the bench to share with him the burden of his high responsibility. His rule of judgment was to be the discretion of one good man—not of any one good man, but

of that ideal excellence in human nature, the dictates and promptings of which are the basis of equity. How well did his qualities of heart now stand to his service ! In our great social equality it would happen that individuals of wealth, influence and powerful connexions would almost challenge the strength of justice herself. But no matter how lofty or how powerful, when fraud, falsehood or injustice raised an offending front he feared not to strike ; not only was the blow felt, but he had not stopped to bind flowers around the sword of justice to ease its stroke. He declared his object and did not fail to call things by the names they ought to bear.

In the midst of such services, and in the meridian of his powers and usefulness, before his sun had begun to decline, he was obliged by the constitution to retire to private life. It was indeed to private life, but it was not from public service. He was essentially a public man, the property of the age he lived in. He now delivered those lectures which have been so justly praised. He began a new intercourse with the young. To how many, now here, do I recall the traits of this intercourse ! How many have approached him with the reverence and the awe which his elevated rank and his weighty services called forth, to wonder at the union in him of the utmost simplicity with the greatest merit. It is said that the boy is father to the man ; of him it may be said that the boy and man lived together united, to his latest years, and until death removed him from our affections. Of his Commentaries we need not speak ; their comprehensiveness of subject, their minuteness, their wide reception and extended usefulness, place them beyond our praise. At the same time, the grace and beauty of the language in which they are expressed, raise him as high as a classic English writer, as their other merits place him as a jurist.

But great as he was as Judge, great as a lawyer, he was still greater as a man. Who shall describe his extended general knowledge ? who measure the kindness of his heart ? who portray his purity, his integrity, his truth, his manly courage in the cause of virtue ? Living, as he did, in the most open exposure of his heart by the frankness of his nature, and filling the memory of us all with anecdotes of his conduct, who has ever heard, even in jest, of an impure thought or of a saying from him which would mantle with a blush the cheek of modesty ? We may not ask ourselves of his truth, integrity and courage, lest we pass the possible conceptions of those who knew him. Nor did he rest his virtues on any basis short of that of religion. He could not deny or fail to acknowledge that Great Judge to whom all must account. Dispenser as he was of justice among men, and so in

APPENDIX.

some sense representing the Great Supreme to men, he felt his humility before Him. He openly acknowledged His name, he unreservedly professed faith in His Son. How great was his example! May we not rejoice with an honest satisfaction that he was of us; that in him we may reasonably indulge the pride, that he was of our order?

Surveying all the effulgence of this bright example, of this life full of public service and of private virtues, and deeply feeling his loss, yet is it not difficult to say, whether our grief that such a man has died be not less than our joy and satisfaction that such a man has lived?

Mr. HUGH MAXWELL rose to say, that he could not refrain from adding his feeble, though heartfelt tribute of admiration and esteem for the memory and character of the illustrious deceased. He would fall far beneath the mark at which he might aim in attempting to do justice to the merits of Chancellor KENT. The time and the occasion admitted little more than the opportunity of pouring out suddenly awakened feelings of sorrow for the loss of so great and good a man. Reference had been made by the eloquent speakers who had addressed the Bar, to the private character of Chancellor KENT,—they had depicted the daily beauty of his life, reflected from the faithful discharge of duties as a father, a husband, and a friend. He too, wished to express his admiration of the deceased in these relations. He had had the happiness, for five years, of almost daily intercourse with him, as a neighbor and a friend. He had seen him in the city and in the country, at home and abroad, and he could not but admire the “daily beauty of his life.”

In common with all truly great men, Chancellor KENT was remarkable for the simplicity of his mind and manners. The youth as well as the man in years, were alike interested and instructed the first moment they came into his presence and society. He affected no superior knowledge or attainments, and yet few men could be insensible to the extent, the accuracy and elegance of his mind. The great topics of the day he seemed always to have mastered before others who were nearer the busy haunts of men. Weighty questions in politics, legislation, law and literature, received his attention and study, after his retirement to private life, and he never failed to express his opinions with frankness and decision.

Mr. Maxwell would pass to a brief view of his public life. As a magistrate he was preëminently distinguished. His example on the Bench in point of manners and bearing, his respect for the Bar, and

the unfeigned respect of the bar for him, might well serve to add dignity and efficiency to the character of his administration. The labors of his judicial life are in the records of the jurisprudence of the age, and with his treatise on the American law, remain imperishable monuments of his integrity, his learning and eloquence. Reference had been made to the difficulties he had surmounted in the course of his public life. Amid these the great influence he ever exercised during the most embittered periods of political excitement, was most remarkable. It is indeed true, that few men ever had so strong a hold on the confidence of a community, embracing all descriptions of men—politicians as well as others—friends or foes. Chancellor KENT was of the school of Washington and Hamilton, and died in the faith of that illustrious school. He never flinched from the expression of his views, and like all men of vigorous minds and public spirit, his opinions were of a decided character. His associates on the bench of the Supreme Court were distinguished for the earnestness of their political feelings. Mr. M. thought the character and conciliating deportment of KENT tended, like oil thrown upon the water, to assuage political acrimony, and to disedge the acerbity of personal feeling. He was fearless in the discharge of his duty. He was severe in his judgment as to right or wrong, and yet no one was ever more kind and gentle to the members of the bar. The profession owe him a debt of gratitude for the example he has left—of being ever willing to hear with patience—of ever evincing his desire to learn from the investigations of the bar, the true aspects of the case under discussion.

Chancellor KENT attained the level of Lord Mansfield in legal and judicial eminence. This Mr. M. said with confidence, from a study of the character of the two illustrious men. The record will afford ample means to enable mankind to judge of the merits of each. In moral courage and disinterestedness, KENT was not a whit inferior to his great predecessor. With Lord Mansfield, he thought that there were things to be acquired by the favor of government or people, which were not worth ambition.

In the language of Lord Mansfield KENT could truly say, "I wish popularity, but it is the popularity which follows, not that which is run after—it is the popularity which sooner or later will not fail to accomplish noble ends by noble means." These sentiments ever preserved him from being soiled by the breath of political rancor, although a decided and avowed disciple of the Federal school of politics. He was identified with the policy, and the principles of his party, with Hamilton, Jay and Marshall. As the fabled river of antiquity which ran

into the ocean without mingling with its waters—so Chancellor KENT was identified with his party friends, without becoming a partisan.

At the age of sixty he retired from the Bench. In the full possession of his faculties he has lived to adorn the profession, and ennoble by his example the character of the lawyer and the citizen. What a picture of grace and dignity is presented to the world on his relinquishing for ever the honors and employments of public life. Well indeed might he have exclaimed, when putting aside the ermine he had worn so long and so well—

*Laudo manentem : si celeres quatit
Pennas, resigno quæ dedit, at mea
Virtute me involvo, probamque
Pauperiem sine dote quæro.*

Since that period he has been engaged in professional duty, and in the production of his Commentaries,—a work not less distinguished for learning, political wisdom and legal acumen, than for eloquence and classic taste. Thus he has conferred additional obligations on the profession and his country.

His respected friend, Mr. Lord, has paid a just tribute to the character of Chancellor KENT, as a Christian man.

Yes—Kent has enrolled his name with the illustrious dead who have embraced the faith of Christ. Kent lived within no narrow dogma of Christian duty. He professed and practised the injunction of the great Apostle, “Add to your faith virtue, and to virtue knowledge, and to knowledge temperance, and to temperance brotherly kindness, and to brotherly kindness godliness, and to godliness charity;” and in summing up these virtues, he realized the announcement, “By their fruits ye shall know them.”

The resolutions were then unanimously adopted. And Mr. John Duer, of New-York, was subsequently selected to deliver the address to the members of the bar, pursuant to the fifth resolution.

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A

ABATEMENT AND REVIVOR.

- 1 Where a suit abates by the death of some of the defendants, before decree, the proper course for the survivors, if they wish to speed the cause, is to move for an order that the complainant revive the suit within such time as shall be directed by the court, or that his bill be dismissed with costs. *Har-rington and wife v. Becker*, 75

Where a suit abates by the death of one of the original defendants, and a third party subsequently acquires the interest of the deceased party, by purchase from his heirs before the revival of the suit against such heirs, the suit must be revived, by a bill of revivor and supplement, against the purchaser. *ib*

3. Although a suit in chancery abates, by the death of one of the parties, after the making of a decretal order therein, directing an account to be taken between the parties, the rights established by such decretal order are not lost, or impaired, by such abatement of the suit. *Wood v. Byington*, 387

ACCOUNT.

- 1 Where an appeal calls in question the principles upon which an account is directed to be taken by the decree appealed from, as well as the liability of the appellants to account at all, the court of chancery will not allow such account to be taken before the appeal is disposed of; without, at least, re-

quiring the respondents to stipulate to pay all the expenses of taking such account, in case the decree shall be reversed, or modified in any respect, so as to require the account to be taken anew. *McGeoch and others v. Bullions*, 34

2. A party seeking to open a settled account, in a proceeding before a surrogate for an account, should be able to show such a case as would have enabled him to file a bill in equity to surcharge and falsify such account. *Valentine v. Valentine*, 430

See SURROGATE, 1 to 5.

ACCUMULATIONS.

See TRUSTS.

ACTION.

In an action at law upon a joint contract, against two defendants, the plaintiff must succeed as to both, or neither of them; unless one of them sets up a matter of discharge which is personal to himself alone. *Sperry v. Miller* 632

ADVERSE POSSESSION.

1. It was the intention of the revisers to exclude a party from instituting a partition suit, for the partition of premises held adversely to him, until after he had obtained possession of his share of the premises, or some part thereof, by ejectment or otherwise. *Burhan v. Burhans*. 399

2. Where a bill is filed for a partition of premises which are held adversely to the complainant, but there is nothing in the bill showing the adverse possession, the defendant must set up that defence by plea or answer. *ib*
3. But it is not necessary for the defendant to set up the defence of adverse possession specially, in his answer, or by plea, where the fact that the premises are held adversely to the complainant, is distinctly stated in the bill itself. *ib*
4. The proper course for the court, where the lands of which partition is sought are held adversely to the complainant, is to dismiss the bill, as prematurely filed; but without prejudice to the complainant's right to institute a new suit, for the partition of the premises, after he shall have obtained possession of his undivided share, or interest therein, by a recovery in an ejectment suit, or otherwise. *ib*

AFFIDAVIT.

See FORECLOSURE SUIT, 1.

AFFINITY.

1. By the common law, it is a good cause of challenge to a juror that he is of kin to either of the parties, by consanguinity or affinity, within the ninth degree *Paddock v. Wells*, 331
2. Affinity properly means the tie which arises from marriage, betwixt the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. And the blood relatives of the wife, while the marriage tie continues, stand in the same degree of affinity to the husband as they do in consanguinity to her. *ib*
2. Relationship by affinity may exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity. *ib*

4. But there is no affinity between the blood relatives of the husband and the blood relatives of the wife. *ib*
5. The death of the husband, without issue, will sever the tie of affinity between the wife and a third person, to whom she is related in consequence of the husband's relationship to him by consanguinity only. But if there be living issue of the marriage, who survive the husband, such issue will continue the relationship, by affinity, between the wife and the blood relatives of her deceased husband. *ib*

AGREEMENT.

1. A parol executory agreement, between an individual and a rail-road company that the latter shall continue to stop with their cars at a particular place, adjacent to his property, as a permanent arrangement, is void by the statute of frauds; because from the nature and terms of the agreement it is not to be performed within one year from the making thereof. *Pitkin v. The Long Island Rail-Road Company*, 221
2. Whether a parol agreement, made by the trustees of an incorporated religious society, with an individual, for the right to use the real estate of the corporation, and an advancement of money for the erection of buildings on such real estate, and the taking possession of the premises pursuant to such agreement, will give to such person an equitable interest in the permanent use and possession of the premises, without rent? *Quære. DeRuyter v. The Trustees of St. Peter's Church*, 555
3. Where a contract was made between the complainant and the defendant, under seal, by which the latter agreed to separate iron ore for the former at a specified price per ton, and the complainant stated, in his bill, that at the time of making such contract he was not aware of the existence of the provision of the revised statutes declaring that twenty hundred pounds avoirdupois shall constitute a ton; and that it was the uniform practice and usage, in the vicinity of the parties, to estimate iron ore by gross weight, at the rate of 2240 pounds to the ton, which usage was known to, and acted upon by, the parties; and that it was under

stood and intended by both parties that the ore should be accounted for at such gross weight; and the bill prayed for a perpetual injunction against a suit at law, brought by the defendant to recover of the complainant compensation for separating the ore at the rate of 2000 pounds to the ton, and also prayed that the contract might be reformed, so as to correspond with the usage and the understanding of the parties; *Held* that the court of chancery could not make a decree, reforming the contract, founded upon the complainant's alleged ignorance of the existence of the statute, fixing the number of pounds necessary to constitute a ton, where the answer of the defendant denied any knowledge of the alleged ignorance on the part of the complainant, and positively denied the existence of the alleged custom, or that the defendant intended to contract to separate the ore in any other way than at the legal rate of 2000 pounds to the ton. *Hall v. Reed*, 500

4. Where a party has made a contract with another to separate ore for him, at a specified price per ton, and has carried such contract partially into effect, by separating ore under it for several months, without any knowledge of the alleged ignorance of the other party that 2000 pounds was a ton, instead of 2240 pounds, as he supposed, the court of chancery cannot reform the contract, so as to require such party to separate ore at the stipulated rate for each gross ton, without making an entirely new contract for him. *ib*

See ASSOCIATION.
EASEMENT.

ALIMONY.

1. The order, directing a reference to a master to inquire and report as to ad interim alimony, during the pendency of a suit for a divorce, should direct that, upon the coming in and confirmation of the master's report, the husband pay to the wife the sum allowed by the master for alimony, and payable as directed by the report. *Gerard v. Gerard*, 73
2. Without a previous order of the court, directing a husband to pay the amount to be allowed for alimony, he cannot be brought into contempt for not

paying the alimony fixed by the master. *ib*

3. It is not a matter of right that a wife who has commenced a suit for a divorce should be allowed her ad interim alimony, in all cases. The allowance rests in the discretion of the court. *Jones v. Jones*, 146
4. The same general principles are applicable to suits brought by the wife against the husband, for a separation from bed and board, on the ground of cruel treatment, or of abandonment. But in this class of cases the wife cannot institute a suit against her husband without the assistance of a responsible person as her next friend; who is to be answerable to the defendant, for the costs of the litigation, if the complainant fails in the suit. And the court, in cases of this nature, will not direct an advance to be made to the wife, or to the next friend, for the purpose of carrying on the suit, or for alimony pendente lite, where there is no probability that the complainant will be able to succeed in her suit. *ib*

See DECREE, 9, 10.
DIVORCE.

ALTERATION OF INSTRUMENTS.

1. Where the holder of a bond and mortgage, without authority from the mortgagor, altered the condition thereof in two very essential particulars, to the disadvantage of the mortgagor; and after the refusal of the latter to ratify the alteration, the mortgagee transferred the bond and mortgage to a third person, as valid and genuine securities, to secure the repayment of a loan of money to himself: *Held* that neither the assignee, nor any other person claiming title to the bond and mortgage through or under the person committing the fraud, as the assignee thereof, could enforce the collection of the mortgage, in a court of equity, against the mortgaged premises in the hands of the mortgagor, or of persons claiming title under him. *Waring v. Smyth*, 119
2. The modern rule is, that the alteration of a bond, or other sealed instrument, in a material part, if made by a party claiming to recover upon such instrument, or by any person under whom he claims, renders the deed void. *ib*

2. But an alteration by a stranger, without the privity or consent of the party interested, will not render the deed void, where the contents of the same, as it originally existed, can be ascertained. *ib*
 4. The burthen of proof in such cases, however, is cast upon the party seeking to recover upon the deed, to show that the alteration was not made by him, nor by those under whom he claims, nor with his or their privity or consent. *ib*
 5. A distinction is made between deeds which operate to convey the title to property, and those which merely give a right of action. For where the legal title to real estate passes to the grantee, by the execution and delivery of the deed, a fraudulent alteration of the deed by him will not have the effect to re-vest the title in the grantor; in those cases where the statute of frauds requires a written conveyance to transfer the title. *ib*
 6. In this class of cases, the estate which was vested in the grantee, by a genuine and valid deed, remains in such grantee, although he destroys or makes void the deed itself, by a forgery, or by a voluntary cancellation of the deed which created that title. But the deed itself is avoided thereby, so that the grantee cannot recover upon the covenants therein, nor sustain any suit founded upon the deed itself as an existing and valid instrument. *ib*
- ment of the accounts of executors, and which discharges them from all further responsibility on account of the personal estate of their testator, upon payment of the several sums specified therein, may be appealed from at any time within three months. *Smith v. Van Kuren*, 473
2. Where a decree, by a surrogate, for the final settlement of the account of an executor, is erroneous, because the surrogate had no authority to make it, that fact affords a good ground for reversing the decree; but not for restricting the right of appeal, to a shorter time than would have been allowed if the decree had not been erroneous upon the ground that it was unauthorized. *ib*

2. *Petition of appeal.*

3. The petition of appeal, upon an appeal from a surrogate's decree, should name all the persons intended to be made respondents, and should pray that they may answer such petition. *Valentine v. Valentine*, 430
4. After parties have voluntarily appeared and answered a petition of appeal, they cannot object that the petition is informal as to them. *ib*

3. *Parties to.*

5. Persons against whom no proceedings have been had in the appellate court, upon an appeal from a surrogate, and who have neither appeared nor answered the petition of appeal, are not to be considered as parties to the appeal. *ib*

4. *Certificate of probable cause.*

6. The legal presumption, upon an appeal, until the contrary is shown, is that the decree appealed from is right. And a certificate of probable cause for appealing, given for the purpose of staying the proceedings upon an appeal, has no other effect than to show that the judge who gives the same thinks it possible that his decision and decree may be wrong; not that it is probably wrong. *Williamson and wife v. Field*, 281

5. *Security to stay proceedings.*

7. Where a decree declared that the complainants in the suit were entitled to certain premises, and to the rents and profits thereof, after satisfying certain mortgages thereon; and ordered a re

AMENDING BILL.

See PRACTICE, 1.

ANNUITY.

See CREDITOR'S BILL, 1.

ANSWER.

See PLEADING, 2 to 5.

APPEAL

1. *Within what time to be brought*

1. A decree of a surrogate which, upon its face, purports to be a final settle-

- ference to a master to take an account of such rents and profits ; and directed that upon the coming in and confirmation of the master's report, certain of the defendants, within six months thereafter, should pay the balance reported against them, with interest ; and that the defendants should convey the premises to the complainants ; *Held* that the defendants appealing from such decree were not entitled to have the proceedings thereon stayed, without giving security to protect the rights of the complainants as established by the decree. *ib*
8. *Held also*, that the fact that some of the appellants were executors and trustees, and that others were infants, formed no sufficient ground for taking the case out of the general rule ; though it might induce the court to change the form of the security, if it could be done without injury to the rights of the respondents. *ib*
9. Where parties appealing to the chancellor, from a decree of a vice chancellor, have money in their hands which they have received for rents and profits of premises decreed to belong to the respondents, the fact that the appellants claim to withhold the money in a fiduciary character will not excuse them from giving security, upon the appeal, to pay such money, together with interest, by way of damages, in case the decree shall be affirmed. *ib*
6. *Damages upon.*
10. The court of chancery being authorized by statute, upon the affirmance of a decree of a surrogate, to award damages to the respondent for the delay and vexation caused by the appeal, it is proper that such damages should be awarded to the respondent in all cases, where he has been delayed by the appeal, and where it is evident that damages have been sustained in consequence thereof. *Stagg v. Jackson and wife*, 86
11. Where the appeal is from a final decree directing the payment of money, interest on the amount decreed to be paid, during the time the collection of the money has been suspended by the appeal, is the proper measure of damages to be awarded to the respondent. *ib*
7. *Effect of appeal upon power of court below.*
12. After an order of the chancellor, confirming a master's report, and directing

the payment of the money reported due, has been affirmed by the court of errors, on appeal, the chancellor is not authorized to set aside, or alter, that order, as erroneous. *The Utica Insurance Company v. Lynch*, 573

13. After an order of a vice chancellor, denying an application upon the merits, has been affirmed by the appellate court, it is erroneous for him to permit the former motion to be renewed and to grant the application. *Dodd v. Astor*, 395

See ACCOUNT, 1.
CHANCELLOR.
VICE CHANCELLORS.

ARBITRATION AND AWARD.

1. A party is not entitled to an injunction to stay proceedings, in a suit at law, upon an award, on the ground that the award was obtained by the fraud and corruption of the arbitrators, or that there never was any submission to them as arbitrators. *Snediker v. Pearson*, 107
2. The defendant, in such a case, has a perfect defence at law to the suit upon the alleged award. *id*
3. At common law it was not necessary that a submission to arbitrators should be in writing ; except where the controversy related to land, or to some matter in respect to which it was incompetent for parties to make a valid and binding agreement by parol. And where a submission is verbal, without any provision therein that the award shall be in writing, a verbal award is valid, at common law, *Valentine v. Valentine*, 430
4. Where a matter is submitted to arbitrators, it is not necessary that there should be any express agreement to abide by the award, when made. The law implies such an agreement, from the very fact of the submission. *ib*

ASSIGNMENT.

See DEBTOR AND CREDITOR.
MORTGAGE, 7, 8.

ASSIGNOR AND ASSIGNEE.

1. As a general rule, the court of chancery will not entertain a suit brought by

the assignee of a debt, or a chose in action, which is a mere legal demand; but will leave him to his remedy at law, by a suit in the name of the assignor. *Ontario Bank v. Mumford*, 596

2. Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, to prevent a failure of justice, he will be allowed to bring a suit in chancery, in his own name, upon a mere legal demand. *ib*

3. In this state no provision is made, by law, authorizing the assignee of a chose in action to bring a suit at law in the name of the assignees in bankruptcy of his assignor, without their consent. And where it appears that the assignee in bankruptcy, of the obligee in a bond, refuses to join in a suit for the recovery of the damage consequent upon a breach of the condition thereof, such refusal will justify the interference of the court of chancery, in behalf of the assignee of such bond, if the only remedy of such assignee, at law, is by an action in the joint names of the assignor thereof and of his assignee in bankruptcy, or in the name of the assignee in bankruptcy alone. *ib*

4. Where a debt is due to two persons jointly, and one of them is decreed to be a bankrupt, or where one of them makes an assignment under the insolvent acts, the action for the recovery of the debt, in a court of law, must be brought in the names of the other creditor and of the assignees, jointly; and neither can sue in his own name alone. *ib*

5. Nor can the suit be brought in the joint names of the original creditors, in such a case; except where the bankrupt was a mere nominal owner of the debt, as trustee or otherwise. *ib*

6. The fact that the assignment of a bond, and the damages to be recovered thereon, in the name of the assignor, is not absolute and unconditional, but merely as a collateral security, makes no difference with respect to the right of the assignee to sue in the name of the assignor alone. The action, in such a case, must be brought in the name of the assignor; and it cannot be sustained if brought in the names of his assignees in bankruptcy, who have no interest therein. *ib*

. And even if the assignor of the bond were dead, that would afford no excuse

for the assignee's coming into a court of equity for relief. For the suit upon the bond may, in that case, be brought in the name of the assignee, under the provision of the statute on the subject, in case there is no personal representative of the decedent, or where such representative refuses to sue for the damage sustained by a breach of the condition of the bond. *ib*

ASSISTANT VICE CHANCELLOR.

See DECREE, 12.

ASSOCIATION.

1. Where it was provided, by one of the articles of association of a private company, that within six years from the date of such articles, the trustees should proceed to take measures for closing the concerns of the association, and to that end should cause all effects and securities held by them, or by the association, to be collected, or converted into money, and all the property to be converted into money, by sale or otherwise, as fast as practicable; and should, from time to time, declare and pay to the shareholders dividends on the capital stock, until all the property and effects of the association should be divided among the stockholders; *Held*, that although it might not be for the interest of all the shareholders, or even of a majority of them, to have the property and effects of the association converted into money, and distributed, at the time specified in the articles of association, yet, if any of the shareholders desired to have it done for their benefit, they had a right to insist that the written contract should be carried into effect, according to its spirit and intent, without any unreasonable delay. *Mann v. Butler and others*, 362

2. *Held also*, that if the lands could not be disposed of for cash, at private sale, the trustees should sell them at auction; after giving reasonable notice to the shareholders, so that they might attend the sale and see that the property was not sold below its cash value. And that the same disposition should be made of the bonds and mortgages, and other securities, if they could not be collected, or sold at private sale, within a reasonable time. *ib*

ATTORNEYS.

1. The provisions of the statute making it a criminal offence for an attorney, counsellor or solicitor to buy any bond, bill, or other chose in action for the purpose of bringing a suit thereon, applies to the purchase of a chose in action for the purpose of instituting a suit thereon in equity, as well as to a purchase in order to bring a suit thereon at law. *Baldwin v. Latson*, 306
2. In the court of chancery, the suit upon a chose in action must be brought in the name of the real owner thereof. And if it has been purchased in violation of the positive prohibition of a statute, the only defence which can be set up in that court, founded upon such prohibition, is that the title to the chose in action did not pass to the complainant, by the illegal purchase and the assignment to him. *ib*
3. The object of the statute prohibiting the purchase of choses in action, by attorneys, &c. for the purpose of bringing suits thereon, was to prevent attorneys and solicitors from purchasing debts or other things in action, in order to obtain costs by prosecuting the same. It was not intended to prevent such a purchase for the honest purpose of protecting some other important right of the assignee. *ib*

B

BANKING.

1. The sixth section of the title of the revised statutes relative to unauthorized banking, applies to foreign as well as to domestic corporations. And foreign corporations are still prohibited from keeping any office in this state for the purpose of receiving deposits, or for discounting notes or bills. *Taylor v. Bruen*, 301
2. Where such a corporation authorizes one of its officers, or an agent, to attend from time to time at certain known places in this state, for the purpose of receiving deposits or for the purpose of discounting notes or bills, with the funds of the corporation, and for its benefit, such known places of attendance are to be considered as offices of discount and deposit, of the corporation, illegally kept for the purposes prohibited by the statute. *ib*

3. And the officer or agent of a foreign corporation who thus carries on the business of discounting notes and bills in this state, with the funds of such corporation, and for its benefit, renders himself personally liable to the penalties prescribed by the 7th section of the act relative to unauthorized banking. *ib*
4. He cannot, therefore, be compelled to make a discovery of such violation of the statute, to aid the defence in a suit at law, brought in his own name, upon a note thus discounted by him as the officer or agent of a foreign corporation. *ib*

BANKRUPT, AND BANKRUPT LAW.

1. *Effect of proving a debt against bankrupt.*
 1. A judgment creditor, by coming in and proving his judgment, as a debt, under proceedings in bankruptcy, against his debtor, precludes himself from proceeding farther in a creditor's suit against the debtor, or against his estate which has been acquired subsequent to the decree in bankruptcy; although such proceedings in bankruptcy do not result in the discharge of the debtor. *Haxtun v. Corse*, 506
2. Notwithstanding the general language contained in the 5th section of the bankrupt act, congress did not intend that the proving of debts, by creditors, under the proceedings in bankruptcy, should be an absolute abandonment of all claim against the future acquisitions of their debtor, where his discharge is refused, or where it is void for any of the frauds specified in the act; but merely that the proving of debts under the decree should be considered as a waiver of the right of the creditors to institute any suits or proceedings, either at law or equity, which are in any way inconsistent with the election of such creditors to obtain satisfaction of their debts out of the property of the bankrupt, under the decree; and a consent to be bound by the discharge, in case the bankrupt should obtain one which was not impeachable for fraud or wilful concealment of his property *ib*
3. This construction of the bankrupt act will protect the bankrupt from any proceedings against him, either at law or in equity, until it shall be finally set-

tled that he is not entitled to a discharge. And where a discharge is granted, it will likewise protect him against the claims of fiduciary creditors, who have come in and proved their debts under the decree in bankruptcy. *ib*

4. And it seems that a proper construction of the bankrupt act will prevent foreign creditors, who have come in and proved their debts under the proceedings in bankruptcy, from instituting suits in another country against a discharged bankrupt; if his discharge was not obtained fraudulently. *ib*

5. But it will not deprive creditors who have come in and proved their debts, and who have successfully resisted the discharge of the fraudulent bankrupt, of all claim to his future acquisitions. Nor will it deprive them of the right, which is given under the 4th section of the act, to impeach the discharge for fraud or wilful concealment of property, where such fraud is discovered after the discharge has been obtained; if the creditors have not litigated the question of fraud, upon the proceedings in bankruptcy, so as to be estopped, by the decision of the court or jury, from setting up the same matter again. *ib*

6. Where a creditor's bill against a bankrupt, founded upon a judgment recovered previous to the decree in bankruptcy, was filed subsequent to such decree, and before the creditor came in and proved his debt under the proceedings in bankruptcy, and where, at the time such debt was proved, the application for the discharge of the bankrupt was still pending and undetermined; *Held* that it would be inconsistent with the intent and meaning of the 5th section of the bankrupt act, for the complainant to retain the lien he had acquired upon the property of the bankrupt, by the filing of his creditor's bill; so as to enable him to prosecute that suit to effect if the discharge should be subsequently denied. *ib*

7. The 5th section of the bankrupt act does not merely suspend suits, commenced against the bankrupt, in the situation in which they are at the time the creditors come in and prove their debts under the proceedings in bankruptcy; but all proceedings which have been commenced previous to that time are absolutely relinquished, sur-

rendered, and discontinued, by the mere act of proving the debt for the recovery of which such proceedings were instituted. *ib*

2. Future acquisitions.

8. Under the English bankrupt laws, all the future acquisitions of the bankrupt, down to the time of the obtaining of his certificate, or discharge, belong to his assignees; for the benefit of his creditors who have come in under the commission and proved their debts, until such creditors are fully paid. But under the late United States bankrupt law, the assignee is only entitled to property which the bankrupt owned, or had an interest in, at the time of the decree declaring him a bankrupt; although such bankrupt fails to obtain a discharge. *ib*

See also *supra*, 5.

3. Rights of assignees.

9. Assignees in bankruptcy do not take the whole legal title in the bankrupt's property, as heirs and executors do. Nothing vests in them, even at law, but such estate as the bankrupt had a beneficial as well as a legal interest in; and which interest is to be applied, by the assignees, for the payment of the debts of the bankrupt. *Ontario Bank v. Mumford*, 596

See ASSIGNOR AND ASSIGNEE, 3, 4, 6.

BILL OF DISCOVERY.

1. Where a simple bill of discovery, in aid of a suit at law, shows that the complainant has a good cause of action against the defendant in the action at law, and that the discovery sought for is material to enable the complainant to succeed in such action, it is not necessary, except for the purpose of obtaining an injunction, for the complainant to allege in his bill that he cannot establish his right at law without a discovery from the defendant. *Vance v. Andrews*, 370

2. The filing of a bill of discovery in aid of a suit at law is justifiable, where the costs of such bill will probably be less than the expense of executing a commission, in a foreign country, to prove the facts of which a discovery is sought. *ib*

1. A defendant in a bill of discovery, in aid of an action at law for the recovery of a debt, cannot plead payment of the debt, before the commencement of the action at law, in bar of the discovery sought by the complainant's bill. For that would transfer the trial of the action at law to the court of chancery: and that too without the power of deciding the case here, if the plea turned out to be untrue. *Sperry v. Miller*, 632

4. Where a defendant in a suit at law applies to the attorney of the plaintiff, for a discovery, he should at least state to the attorney the material fact which he wishes his client to admit, to save the necessity of a bill of discovery. And if the attorney does not possess the information necessary to enable him to make the admission, the defendant should request him to communicate with his client and obtain such admission from him; and should then wait a reasonable time to enable the attorney to obtain such admission from his client. *Deas v. Harvie*, 448

5. The defendant, in an action at law, cannot file a bill in chancery to obtain from his adversary a discovery of the nature and grounds of the claim to recover against him in that action, to enable him to judge whether he has any defence. But the complainant must state, in his bill, the facts which exist, and which he supposes will constitute a good defence to such action; so that the court may see that if the facts, of which a discovery is sought, are admitted by the answer, they will assist in establishing the defence stated in the bill. *ib*

6. The defendant in a suit at law brought against him as acceptor of a bill of exchange, by the payee of such bill, is not entitled to a discovery, from the plaintiff, as to the genuineness of the acceptance, upon a bill which charges, upon information and belief, that such acceptance is a forgery. *ib*

See COSTS, 5, 6, 7.

INJUNCTION, 10.

JURISDICTION, 17, 18.

BILLS OF EXCHANGE.

1. The endorser of a draft, who has paid or secured the amount thereof to the

endorsee, and has taken a transfer of the draft, has a right to sue the acceptor, and to recover, for his own use, the same amount which the endorsee could have recovered in a suit upon the acceptance. *Deas v. Harvie*, 448

2. It is immaterial, in such a case, whether the endorser, on procuring the transfer of the draft and acceptance, has paid the endorsee the amount thereof, or has given him security for such payment. *ib*

3. So if the endorsee has relinquished his claim upon such acceptance, to the endorser, for a mere nominal consideration, that circumstance will not vary the amount of the recovery in an action brought by the endorser against the acceptor. *ib*

BOND.

See ALTERATION OF INSTRUMENTS.

ASSIGNOR AND ASSIGNEE, 3, 6, 7.

EXECUTORS AND ADMINISTRATORS, 17.

RECEIVER, 1.

C

CASES OVERRULED, QUESTIONED, COMMENTED ON, AND EXPLAINED.

1. The case of *Guion v. Knapp*, (6 *Paige's Rep.* 35,) explained. *Stuyvesant v. Hull*, 151

2. The cases of *The People v. Abell*, (3 *Hill's Rep.* 109,) and *Berthelon v. Batts*, (4 *Id.* 577,) commented upon. *Spear v. Wardell*, 291

3. *Wood v. Bolard and al* (8 *Paige's Rep.* 556,) explained. *ib*

4. The case of *Hall v. Gird*, (7 *Hill's Rep.* 586,) commented on. *Baldwin v. Latson*, 306

5. The case of *Many v. The Beekman Iron Company*, (9 *Paige's Rep.* 188,) explained, and limited. *Hall v. Reed*, 500

6. The decision of the district court of the United States for the southern district of New-York, in the *Matter of*

King, (5 *Law Rep.* 320,) that creditors could not file objections and contest the bankrupt's right to a discharge, without having come in and proved their debts under the decree in bankruptcy, questioned, and its correctness doubted. *Haxton v. Corse*, 506

7. The case of *Johnson v. Gere*, (2 *John. Ch. Rep.* 546,) commented upon; and the decision, as reported, questioned. *Miller v. Avery*, 582

CERTIFICATE.

See *APPEAL*, 6.
CUSTOM, 1.
DEED.

CHANCELLOR.

- 1 The constitution having given to parties an appeal to the chancellor from all inferior equity tribunals, and the legislature not having made any provision authorizing any other person to sit for him in a case where he is related to one of the parties, the chancellor is bound to hear an appeal, even where a near relative is personally interested therein. *Matter of Leefe and wife*, 39
2. The provision of the statute, prohibiting any judge from sitting, where he is related to either of the parties, is controlled by the constitution, as the paramount law. *ib*

COMMERCIAL CONTRACTS.

See *CUSTOM*, 2 to 5.

COMMISSIONS.

See *EXECUTORS*, &c. 27, 28.

COMMITTEE.

See *IDIOTS AND LUNATICS*, 6.

CONSIDERATION.

See *DEED*, 1, 2.

CONTEMPT.

Without a previous order of the court, directing a husband to pay the amount to be allowed for alimony, he cannot be brought into contempt for not paying the alimony fixed by the master *Gerard v. Gerard*, 73

CONTINGENT INTERESTS.

1. Where a contingent interest in personal estate is not legally and effectually disposed of by the will of the testator, it belongs to the personal representatives of those who were his next of kin at the time of his death, and not to those who are the next of kin at the time of the happening of the contingency upon which the intestacy, as to that contingent interest, depends *Matter of Kane and others*, 37
2. The surviving husband of a niece, who was the next of kin of the testator at his death and during her coverture, and not the children or next of kin of the deceased niece, who were the nearest of kin to the testator at the time of the happening of the contingency, is entitled to a contingent interest in the personal estate of such testator not effectually disposed of by the will. *ib*
3. The contingent right which a person has in the estate of another, arising from the chance that he may be entitled to a share in such estate, as one of the next of kin of the owner thereof, should he outlive him, is only a bare possibility, unaccompanied by any interest during the life of such owner; and it cannot be reached by a creditor's bill. *Smith v. Kearney*, 533

COSTS.

1. Of exceptions.

1. A complainant took three exceptions to the defendant's answer, for impertinence, all of which were referred, and the master disallowed the first exception, and allowed the second and third. Neither party having excepted to the master's report, the usual order was entered to expunge the impertinent matter embraced in the second and third exceptions, and for the payment, by the defendant, of the costs of those

exceptions. *Held* that the complainant was entitled to costs, of the two exceptions allowed, which had accrued previous to the entry of the order to refer the exceptions, and to the costs of the order to expunge the impertinent matter, and the costs of other proceedings upon the master's report subsequent to the filing of such report. *Everson v. Hinds*, 117

2. The costs, to which neither party is entitled, as against the other, upon a reference of exceptions, unless he finally succeeds as to all the exceptions referred, are the master's fees upon the reference, and the solicitor's and counsel fees, and other expenses between the perfecting of the exceptions and the filing of the master's report on the reference; including postages, and other disbursements. *ib*

2. On motions.

3. A charge for attending to oppose a motion, pursuant to a notice from the adverse party, is allowable, on the taxation of costs, although the motion was not heard at the term for which it was noticed; provided it was put over upon the application of the party giving such notice. *Aliter* where the hearing of a motion is postponed to another term upon the application of the opposing party. *Pentz v. Hawley*, 552

3. In foreclosure suits.

4. Even in cases where the defendant, in a suit to foreclose a mortgage, has not delayed the proceedings and increased the costs, by an improper defence, the necessary expenses of the suit, as well as of the master's sale, are to be deducted out of the proceeds of the mortgaged premises; thereby rendering the mortgagor, in effect, liable for those costs and expenses, if the proceeds of the sale are not sufficient to pay the whole debt for which he is personally liable. And where the mortgagor sets up an unfounded defence, and thus delays the proceedings, it is proper to charge him personally with the costs; instead of taking them out of the proceeds of the mortgaged premises, which in equity belong to the complainant or to other persons holding incumbrances upon the premises. *Jones v. Phelps*, 440

4. On a bill of discovery.

5. It is a general rule that the complain-

ant, in a bill of discovery, must pay the costs of the defendant. *Deas v. Harvie*, 448

6. The exception to this rule is, where the complainant shows that he has applied to the defendant to admit some fact, material to the defence of the complainant in the suit at law, which the defendant in the bill of discovery refuses to admit; but which he afterwards admits by his answer to the bill. *ib*

7. Where no application for a discovery is made to the defendant himself, previous to filing a bill of discovery against him, and the only application made is to his attorney, who has no information on the subject except what he has communicated to the complainant's attorney, it is not sufficient to excuse the complainant in the bill of discovery from the payment of costs. *ib*

5. Upon applications to surrogate.

8. The costs of the application to the surrogate for an order upon an executor to give security, are properly chargeable upon the fund which is to come to the hands of the executor, and not upon the petitioner personally. Nor should such costs be charged upon the executor personally. *Holmes v. Cock*, 426

6. Retaxation.

9. It is not a proper ground for granting a retaxation of costs, in behalf of a party who has appeared and opposed particular items in the bill, that the taxing officer has, by inadvertence, erroneously allowed an item which was not objected to before him. *Pentz v. Hawley*, 552
10. The party applying for a retaxation of costs will be charged with the costs of opposing his application, where he does not succeed in obtaining a retaxation as to any one of the items objected to before the taxing officer. *ib*
11. But the court will not permit a party to retain, in his bill, charges which are clearly improper to be retained although no objection was made to them before the taxing officer. *ib*

COVENANT.

- 1 Under the provisions of the revised statutes, there is no implied covenant for the payment of a debt which is secured by mortgage upon real estate. On the contrary, the statute declares that where there is no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment has been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. *Hone v. Fisher*, 559

2. No covenant can now be implied in any conveyance, of real estate, which has been executed since the revised statutes, whether such conveyance contains special covenants or not. *ib*

See HUSBAND AND WIFE, 6.
MORTGAGE, 9, 10.

COVERTURE.

See EJECTMENT.

CREDITOR'S BILL.

1. *What may be reached by.*

- Where a person is entitled, under a will, to an annuity for life, payable semi-annually, out of the income of real and personal estate in the hands of trustees, his interest in such annuity, beyond what is necessary for the support of himself and his family, may, under the provisions of the revised statutes, be reached by a creditor's bill, and applied to the payment of his debts. *Sillick v. Mason*, 79
2. The contingent right which a person has in the estate of another, arising from the chance that he may be entitled to a share in such estate, as one of the next of kin of the owner thereof, should he outlive him, is only a bare possibility, unaccompanied by any interest during the life of such owner; and it cannot be reached by a creditor's bill. *Smith v. Kearney*, 533

2. *Motion for receiver.*

3. It is no objection to a motion for a receiver, and to an order for the examination of the defendant on oath before the master in a creditor's suit,

that an answer upon the oath of the defendant is waived, by the bill. *Root v. Safford*, 33

CROSS BILL.

Who may file a cross-bill. *Whitbeck v. Edgar*, 106

CUSTOM.

1. How far custom and usage may be applied to the construction of statutes respecting the proof and acknowledgment of deeds, and to the form of the certificate of acknowledgment. *Meriam v. Harsen*, 232
2. The defendant imported into New-York a quantity of spelter, upon which the collector claimed and received a duty of 20 per cent ad valorem; which spelter was not a dutiable article, being included in the class of articles exempted from the payment of duties, under a different name. He subsequently sold such spelter to the complainant, at *long price*, which by custom was a sale of the vendor's right of debenture, where such right existed. Afterwards, while the spelter remained in the hands of the purchaser, and in a situation in which it might have been exported with the benefit of drawback, had it been a dutiable article, the secretary of the treasury decided that spelter was exempt from duty; and directed all duties which had been previously received, on the importation of that article, to be refunded to the importers; in pursuance of which decision and direction the defendant received back from the collector the 20 per cent duty, which had been paid by him, upon the importation of the spelter in question; although the plaintiff claimed it as belonging to him; *Held*, that the duties thus refunded belonged to the importer, and not to the vendee of the article on which duties had been wrongfully charged; and that such vendee could not compel the defendant to pay the refunded duties to him. *Moore v. Des Arts*, 636
3. *Held also*, that the court could not, from the alleged custom of trade at New-York, and from the fact that the sale was at *long price*, make an agreement for the vendor that the vendee should have the benefit of debenture

upon a sale of goods which were by law free from duty; or an agreement that if the vendor should succeed in recovering back the amount wrongfully received by the collector, for duties, the purchaser should be entitled to the money thus recovered. *ib*

1. Distinction between a sale at *long price*, and a sale at *short price*, according to the usages of trade at New-York. *ib*

5 It is a reasonable presumption, that those who are dealing in articles of commerce, especially those who purchase by wholesale from the importers, are acquainted with the different names by which such articles are known to the commercial world. *ib*

D

DAMAGES.

See *APPEAL*, 10, 11.

DEBTOR AND CREDITOR.

.. The assignee of a debtor's property, under the 16th, 17th, and 18th sections of the non-imprisonment act of April, 1831, takes such property as a trustee for the benefit of all the creditors of the assignor, rateably; and not for the exclusive benefit of the particular creditor who has sued out a warrant against the assignor; or even for the exclusive benefit of the particular class of creditors who were in a situation to sue out a warrant against him. *Spear v. Wardell*, 291

2. The act to abolish imprisonment for debt is based upon the principle that equality among creditors is equity, in the case of an insolvent debtor. And the fraudulent debtor, pending the proceedings against him, by one or more creditors, for an actual or intended fraud, is not permitted to assign or dispose of his property, or any part of it, for the purpose, or with a view, to give a preference to other creditors. *ib*

3 But he is entitled to a discharge from imprisonment upon his paying, or securing the payment of the creditors who have proceeded against him; or giving security to retain his property in its then situation, until they have had

a reasonable time to exhaust their remedies at law, and to file a creditor's bill to reach his property; or upon his making an assignment of his property to such assignee as may be appointed, for that purpose, by the judge before whom the proceedings are had, for the benefit of *all* the creditors *rateably*. *ib*

4. It is not a fraud upon the act, *it seems*, for the debtor, pending the proceedings against him, to make a general assignment of all his property, with proper inventories showing the particulars thereof, and the names of his creditors, with the amounts due to them respectively, to a proper and responsible assignee, for the benefit of all his creditors rateably; and giving to such assignee the same authority to convert the property into money and to apply it to the payment of his debts, and for the same compensation to which an assignee appointed under the act would be entitled. *ib*

5. But any other disposition of his property would be a fraud upon the act, and would render the assignment void as against the prosecuting creditor. And the debtor who has been guilty of such a fraud ought not to be discharged from imprisonment, upon making a mere formal assignment of his property, after having committed such a fraud upon the rights of the prosecuting creditor. *ib*

6. Creditors by judgment merely cannot file a bill in the court of chancery to set aside an assignment, by the judgment debtor, which is subsequent to the lien of their judgment, upon the assigned property, even though it were intended to defraud them. For if such an assignment embraces real estate upon which the judgment is a lien, it will not prevent the judgment creditor from selling the property under execution upon his judgment, which judgment, upon its face, overreaches the assignment. And as respects personal property, judgment creditors cannot file a bill to set aside an assignment thereof, until an execution has been issued, so as to create a lien. *ib*

DEBT

1. *What is the primary fund for the payment of.*

1. A person having a judgment of \$400 against L, who subsequently died, filed

a bill against F. and the administratrix of his deceased debtor, for the purpose of reaching certain real estate which, as the bill alleged, L. had purchased and taken a conveyance for, in the name of F.; but in fact for his own use and benefit. The bill also alleged that L., in his lifetime, confessed a fraudulent judgment to F., which was prior to the complainant's judgment, and that the administratrix of L. had paid or applied his personal estate, amounting to \$10,000, to the payment of the judgment of F., knowing that such judgment was fraudulent. And the complainant prayed for an account, against the administratrix, of the administration of the estate of L., and for an account, against the defendant F., of the moneys and property which he had received from the administratrix, in payment of the fraudulent judgment; and that the defendants, or one of them, might pay the amount due on the complainant's judgment, with costs; *Held*, that the bill was multifarious. *Jackson v. Forrest*, 576

2. *Held also*, that the creditor had no right to follow the personal estate of the debtor into the hands of a third person, to whom it was alleged the administratrix had paid it in her own wrong; without showing that the administratrix and her sureties were irresponsible. *ib*

2. Priority of payment.

3. The fact that an error, which occurred in the docketing of a judgment, was the error of the clerk, and not the fraud of the judgment creditor, or of his attorney, will not authorize the court of chancery to interfere, to deprive another judgment creditor of his legal priority, if he has obtained one, by such error. *Buchan v. Sumner*, 165

See **INSOLVENT CORPORATIONS.**

DECREE.

1. What is a final decree.

1. Where a decree declared that the complainants in the suit were entitled to certain premises, and to the rents and profits thereof, after satisfying certain mortgages thereon; and ordered a reference to a master to take an account of such rents and profits; and directed that upon the coming in and confirma-

tion of the master's report, certain of the defendants, within six months thereafter, should pay the balance reported against them, with interest, and that the defendants should convey the premises to the complainants, under the direction of the master, and surrender the possession to them; and nothing was said in the decree as to the costs of the suit, but it reserved all further and consequential directions not inconsistent with that decree, with liberty to either party to bring the cause to hearing, for further directions, on the coming in of the master's report; *Held*, that so far as related to the payment of the balance which should be found due by the master, and so far as related to the transfer of the legal title of the premises to the complainants, and the surrender of the possession, the decree was, in fact, final. But that inasmuch as the question of costs was not disposed of, and the right was reserved to the parties to set the cause down for a hearing for further directions, &c., it was an interlocutory decree merely. *Williamson v. Field*, 281

2. How far evidence, and against whom.

2. The 13th section of the title of the revised statutes relative to the sale of the real estate of a testator or intestate, is not applicable to a decree in chancery against administrators, after the death of their intestate; so as to make such decree conclusive evidence of the indebtedness of the decedent, as against the heirs and other persons interested in his real estate, upon a proceeding before the surrogate for the sale of such real estate to pay debts. *Wood v. Byington*, 387

3. But a decree against the administrators is conclusive evidence of the indebtedness, as against them, upon the hearing before the surrogate on the preliminary order, requiring them to show cause why they should not be ordered to mortgage, lease, or sell the real estate of the intestate, for the payment of his debts. *ib*

4. The administrators are estopped, by such a decree, from alleging that the debt was not due at the time the decree against them was rendered; or from insisting that the claim of the creditor was barred by the statute of limitations, previous to the commencement of the suit in which the decree was entered. *ib*

5. A decretal order in a suit in chancery, made during the life of the defendant in such suit, establishing a partnership between him and the complainant, and directing an account to be taken between them in reference to the partnership transactions, is conclusive evidence against the heirs of such defendant, as well as against his personal representatives, upon a proceeding before the surrogate for the sale of the real estate of the deceased defendant, for the payment of his debts—not only of the existence of the partnership, but also of the right of the complainant in that suit to call him to account; and also that such right was not barred by the lapse of time or otherwise, at the time such decretal order was made. *ib*

3. *How affected by an abatement of the suit.*

6 Although a suit in chancery abates, by the death of one of the parties, after the making of a decretal order therein, directing an account to be taken between the parties, the rights established by such decretal order are not lost, or impaired, by such abatement of the suit. *ib*

4. *Regularity of, how questioned by a purchaser.*

7 Where a purchaser at a master's sale, under a decree, is himself a party to the suit in which the decree was entered, he cannot, in a collateral proceeding, raise a question as to the regularity of the decree. If the decree is irregular, so that such purchaser will not get a good title to the premises purchased by him, his remedy is to apply to the court, directly, to set aside the decree on that ground. *Concklin v. Hall*, 136

5. *Opening.*

8. *Terms of.*] Where a decree has been taken against a defendant, for want of appearance, after a personal service of the subpoena, the court is authorized to impose such terms as it thinks proper, upon the defendant, as a condition of opening the decree. *Gerard v. Gerard*, 73

9 Therefore it may require the husband, in a suit against him, by his wife, for a divorce, to give security for the payment of *ad interim* alimony to her, *pendente lite*, as well as an allowance for the necessary expenses of her suit. *ib*

10. But if the bill is taken as confessed against the defendant as an absentee, without an actual service of the subpoena, the court has no right to require payment, or security for the payment, of any thing beyond the necessary costs and expenses of the suit, as a condition of letting him in to defend; provided he makes his application within the time prescribed by the statute. *ib*

11 A regular decree, entered by default, will not be opened to let in a defence of usury; without an offer on the part of the defendant to waive the forfeiture, and to consent to a decree for the payment of what is equitably due. *Watt v. Watt*, 371

12. *Decrees made by assistant vice chancellor.*] Whether the chancellor has any power, except upon appeal, to open a regular decree made by the assistant vice chancellor? *Quare. Baldwin v. Latson*, 306

6. *Setting aside.*

See FORECLOSURE SUITS, 15.
HUSBAND AND WIFE, 15.

DEED.

1. *Consideration.*

1. The actual payment of the nominal consideration expressed in a deed, is not necessary to the validity of such deed. It is sufficient if it is stated in the deed to have been paid, as the consideration thereof. *Meriam v. Harsen*, 232

2. As between the parties to a conveyance, where a mere nominal consideration is expressed in such conveyance for the purpose of supporting it, a court ought not to allow proof to be given of the non-payment of any consideration, in order to destroy the deed. *ib*

2. *Construction of.*

3. A., the defendant, the owner of a water power in the Seneca river, sold to the complainants, for the use of their mills, &c. a portion of such water power, and conveyed the same by a deed which described the subject matter of the grant, and the extent of the right granted, as follows "All and

singular the water power, water rights, and right to use the waters of the Seneca river, or outlet, for hydraulic purposes, particularly described as follows: being part of the water power and water rights belonging and appertaining to certain lands lying and being in the place aforesaid, on the south side of the Seneca river, conveyed by C. to the said A., to which lands there is now appurtenant the right of drawing, and using for hydraulic purposes, one half of the surplus waters of the Seneca river, or Cayuga and Seneca canal, belonging to the said A., except the right of drawing and using sufficient water to propel two run of flouring millstones, as conveyed to F. by said A. And the grant of water power and water rights, hereby intended, is the right of drawing, using, occupying and enjoying forever, for hydraulic purposes, sufficient of the waters of the said Seneca river, or surplus waters of the said canal, so as aforesaid belonging to the said A., to propel five run of millstones used for flouring wheat, with the necessary machinery attached thereto, by the most approved wheels, *to be drawn, used, and enjoyed, upon an equality of right with three other like run of millstones, to be used by the said A., his heirs and assigns*; which said five run and three run of millstones shall have preference in the use of the water above described, over the remaining rights now belonging to the said A." The company subsequently acquired the title to four-sixth parts of the privilege of using the water for the two runs of stones which had previously been granted by A. to F.; and an inchoate right to the other two-sixth parts of that privilege, under a sheriff's sale thereof, but the time of redemption as to those two-sixths had not expired. *Held*, that the rights of the parties, under the deed of conveyance, and the previous grant to F., were as follows: That the two run power previously granted to F. must be first satisfied. And that so far as the company had acquired that water power, its right to use it was exclusive of the defendant A. That while the company, or the owner of the other two-sixths of the two run power, were in the use of that water power, the defendant was not at liberty to use the water, or to suffer it to run to waste, so as in any way to interfere with or impair that right. *The Seneca Woollen Mills v. Tillman*, 9

4. *Held further*, that after supplying that two run power, or so much thereof as the parties owning it wished to use, according to their several rights therein, if there was not sufficient surplus water, on that side of the river, at the upper level, to propel eight runs of millstones, exclusive of the half of the surplus waters, or so much of that half as was actually used on the north side, the complainant and defendant must participate in the use of such surplus, in the proportion of five parts to the former and three parts to the latter. And that in the estimate of the water power used by each, there must be included so much of the surplus water as was suffered to run to waste; by the negligence of the parties, respectively; or by their suffering the flumes or other works which they were severally bound to repair, to be out of order. *ib*

5. *Held also*, that in no event had the defendant the right to use more than a proportional part of his three run water power, until the machinery of the complainants was fully supplied, to the extent of a six and one-third run power. And that he had not the right, by running his saw mill in the night time, in dry seasons, so to draw down the surplus waters of the upper level as not to leave, for the complainants, their proper proportion of the water, in reference to the number of hours in the day that the water power was used by each. But that neither party had any right to complain that the other, by running his machinery in the night, obtained the use of water which would otherwise have flowed over the dam and been wasted; provided the water in the pond was not drawn down so as to impair its use during the ordinary hours of using it by the other party. *ib*

3. What passes by.

6. Where several tenants in common of mere life estates in the premises held in common, made a partition of such premises, by parol, and one of them afterwards conveyed the lots set off to him, in such partition, in fee, with warranty, and subsequent to such conveyance acquired an undivided interest in the remainder in fee in the whole premises; *Held*, that his grantees of the part of the premises so set off in severalty, were not entitled to the undivided share which their grantor had

thus acquired in those portions of the premises not embraced in their deed from him. *Carpenter v. Schemerhorn*, 314

4. *Proof and acknowledgment.*

7. A substantial compliance with the requirements of the statutes relative to the proof or acknowledgment of deeds is sufficient; and it is not necessary that the certificate of the acknowledgment should be in the precise words used in the statute. *Meriam v. Har- sen*, 232

8. *Heid*, accordingly, that a certificate which stated that a feme covert acknowledged that she executed a deed *without any fear, threat, or compulsion of her husband*, was a sufficient compliance with a statute requiring an acknowledgment by a feme covert that she executed the deed *freely, without any fear or compulsion of her husband*. *ib*

9. The word *freely*, in the statute, is not used in a sense importing that the wife, in the execution of the deed, should act without a motive, or do it as a mere act of generosity, without any hope of present or future benefit. But it means that she has executed the deed without constraint or coercion, or fear of injury from the husband. *ib*

10. How far custom and usage may be applied to the construction of statutes respecting the proof and acknowledgment of deeds, and to the form of the certificate of acknowledgment. *ib*

5. *Recording.* See RECORDING ACTS.

See ALTERATION OF INSTRUMENTS.
MASTER'S DEED.

DEMURRER.

See PLEADING, 8.

DISCOVERY.

A defendant is not bound to answer or disclose any facts showing that he has been guilty of any act for which he is liable to an indictment, or which can subject him to a penalty, or forfeiture. *Taylor v Bruen*, 301

See BILL OF DISCOVERY

DIVORCE.

1. Where a bill is filed by the husband against his wife for a divorce, on the ground of adultery, and the adultery is denied on oath, the court has the power to direct the husband to pay her a specified sum for her travelling expenses, and board, if it is shown that her health is such as to render it apparently necessary, for the preservation of her life that she should spend the winter in a milder climate. *Gerard v. Gerard*, 72

2. It is not a matter of right, under all circumstances, for a wife who has commenced a suit for a divorce, or for a separation, to require the court to direct an allowance to be paid to her, by the defendant, for the purpose of defraying the expenses of the suit. Nor is it a matter of right that she should be allowed her ad interim alimony in all cases. But the legislature has left the allowance of both to the sound discretion of the court. *Jones v. Jones*, 146

3. Where it is probable, however, that the wife may succeed—especially in a suit for a divorce on the ground of the adultery of the husband—in which the wife is allowed to prosecute in her own name, and where it appears that she is entirely destitute of the means of carrying on her suit, it is almost a matter of course to require the husband to make her a reasonable allowance, according to his ability, for the necessary expenses of the suit. *ib*

4. It is also a matter of course, in such a case, to require the husband to furnish her with the necessary clothing and sustenance, during the pendency of the suit, if he is able to do so. *ib*

See HUSBAND AND WIFE, 5.

DUTIES.

See CUSTOM

E

EASEMENT.

1. An agreement made by a rail-road company, with a person owning land adjacent to the rail-road, to establish and maintain a permanent turnout

track, and stopping place, at a particular point, in the neighborhood of his property, and to stop there with the freight trains and passenger cars of the company, is, in substance, the grant of an easement, or servitude, which is to be binding upon the property of the rail-road company, as the servient tenement, for the benefit of the owner of such adjacent property, and of all those who shall succeed him, in his estate, as owners thereof. And such an agreement, to be valid, must be in writing. *Pitkin v. The Long Island Rail-Road Company*, 221

2. The negative easement, which the owner of the dominant tenement is to acquire by such an agreement, is an incorporeal hereditament; the right or title to which can only pass by grant, or deed under seal, or be acquired by prescription. *ib*
3. The provision of the revised statutes, declaring that no estate or interest in lands, or any trust or power over them, shall be created or granted, except by operation of law, or by a deed or conveyance in writing, &c. is sufficiently broad to prevent the acquiring of an easement in land by a verbal agreement merely. *ib*

EJECTMENT.

1. Where a person having an interest in real estate is under a disability during her lifetime, by reason of coverture, which prevents her from bringing an ejectment, her heirs must bring their suit within ten years after her death. *Carpenter v. Schermerhorn*, 314
2. If one of such heirs is also a feme covert at the death of her mother, that circumstance will not have the effect to extend the period within which ejectment must be brought. For the law does not allow successive disabilities in different persons, taking the same estate by devise or descent from each other. *ib*
3. The provision of the statute, requiring suits by heirs or devisees, for the recovery of land, to be brought within ten years, applies where the person originally entitled to sue is under a disability when the right accrues, and dies before such disability terminates, and thus casts the same estate, by devise or descent, upon heirs or devisees; in which

case the heirs or devisees must bring their suit within ten years after the right of action accrued to them. *ib*

EQUITABLE INTERESTS.

See AGREEMENT, 2.

ESTOPPEL.

See HUSBAND AND WIFE, 6.

EVICTIION.

A verdict for the plaintiff, in an ejectment suit, not followed by a judgment, is not tantamount to an eviction of the tenant; when the question as to the effect of such a verdict arises between the tenant and his grantor with warranty. *Miller v. Avery*, 582

EVIDENCE.

1. To authorize a party to produce, at the hearing, documentary evidence which is not made an exhibit before the examiner, nor distinctly referred to in the pleadings, the notice of intention to make use of such evidence should state sufficient of the substance of the document intended to be produced, to enable the adverse party to see that it is evidence of some fact against him. *Miller v. Avery*, 582
2. The object of requiring the party to give notice of his intention to use documentary evidence upon the hearing, ten days before the closing of the proofs is to enable the adverse party to produce evidence before the examiner to counteract the effect of the documentary evidence mentioned in the notice. *ib*

See DECREE, 2, 3, 4, 5
SURROGATE, 13.

EXAMINATION.

1. Of defendant.

1. Where a defendant is examined by the complainant as a party only, he is merely to be examined as against him-

self, and is not to be cross-examined by his own counsel. But if the complainant examines him as a witness against his co-defendant also, such co-defendant is entitled to cross-examine him, as a matter of course, without any order to that effect. *Tallmadge v. Tallmadge*, 290

2. Of complainant. See HUSBAND AND WIFE, 11, 12.

EXCEPTIONS.

- 1 A complainant who neglects to except to the answer to his original bill, or whose exceptions thereto have been overruled, cannot except to the answer to his amended bill, for insufficiency, upon the ground that the original bill was not fully answered. *Chazournes v. Mills*, 466
- 2 Where the complainant, after excepting to the answer of the defendant and submitting to the master's report thereon, files an amended bill asking for a discovery, without making any new case entitling him to a further discovery, the proper course for the defendant—if the discovery sought is not wholly immaterial, so as to make it a proper subject of demurrer—is to answer the amended bill, without reference to the discovery sought. And then, if the complainant excepts to his answer for insufficiency, upon that ground, he may move to take the exceptions off the files, for irregularity. Or he may insist before the master, upon the reference of the exceptions, that such exceptions relate to the matters of the original bill only; or that the principle upon which the discovery is sought has been decided against the complainant, upon the reference of the exceptions to the original answer. *ib*

EXECUTION.

1. Error in return of.
- 1 The returning of an execution, issued on a judgment in the supreme court, to the wrong clerk's office, it seems is a mere error of form, which even that court would not notice, upon an application to set aside the return for irregularity. *Clark v. Dakin*, 36

2. But if such a return is irregular, application must be made to the supreme court to set aside the return. The irregularity cannot be insisted upon, in the court of chancery, as a ground for resisting an application for a receiver, upon a creditor's bill founded on the judgment at law. *ib*

2. What may be sold upon.

3. The defendant, in a creditor's suit, cannot object that the complainant has not exhausted his remedy against lands which had been sold, or pledged to others, before the execution upon the judgment at law was issued. *ib*
4. The interest of a person holding a contract for the purchase of land, is not bound by the docketing of a judgment against him; and his interest in the land cannot be sold by execution upon such judgment. *Boughton v. The Bank of Orleans*, 458
5. Real estate held in that manner forms an exception to the general rule, that the interest of a defendant in lands of which he is in possession may be sold on execution against him. *ib*

EXECUTORS AND ADMINISTRATORS.

1. Their duty in respect to debts due from legatees or distributees.
- 1 Where a legatee or distributee of an estate owes a debt to the testator, so much of such debt as can be collected by the executor, including the interest due at the testator's death, is to be considered and treated as a part of the capital of the estate; and must be apportioned and distributed accordingly. *Smith v. Kearney*, 533
2. If the whole amount of such debt, and interest, can be collected or received, by the retainer of the income, by the administrator, the interest which has accrued upon the amount which was due at the death of the testator is properly distributable among those who have present interests in the personal estate of the testator; and the sum due at the death of the testator is to be considered and treated as a part of the capital of his personal estate. *ib*
3. But, in such a case, it would be inequitable, in reference to the rights of

persons to whom the testator has bequeathed life interests in his estate, for the administrator to invest as capital, for the benefit of the remaindermen, from the time it was retained, the whole amount received and retained on account of the debt due to the estate, during the life of the debtor. On the contrary, a proportionate part of the receipts, subsequent to the death of the testator, where the whole debt, with the interest which has accrued thereon after his death, cannot be collected, should be considered as interest accrued and received upon the capital of the estate; and should be paid over to those who are entitled to life interests in such capital. *ib*

4. And the proper way to apportion partial payments between the persons entitled to the life interests, and the remaindermen, in such a case, is to consider as capital, so much of the amount, as with the legal interest thereon from the death of the testator, will produce the whole principal and interest collected and which is to be apportioned. *ib*

5. In distributing a fund received and retained, by the executor, on account of a debt due from a legatee or distributee, to the estate of the decedent, where the legatees and the widow, and the next of kin of the testator, had a vested interest, in such debt from the time of his death, although the contingency upon the happening of which that interest was to vest in possession did not occur until some of them were dead, the executor must apportion the same among the legatees, and widow, and next of kin, and those who may be their representatives from time to time, in the same manner, or rather so as to produce the same effect, as if the fund had been received and retained by such executor immediately after the death of the testator. *ib*

2. *Their right of retainer as to legacies.*

6. The right of an executor or administrator to retain the whole, or a part, of a legacy, or distributive share, in discharge or satisfaction of a debt due from the legatee or distributee to the estate, is not only consistent with the soundest principles of equity, but is perfectly well settled by the adjudications of the courts. *ib*

7. This right of retainer depends upon the principle that the legatee or distributee

is not entitled to his legacy, or distributive share, while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid, or which is necessary to extinguish other claims on those funds. And it is against conscience that he should receive any thing out of such funds without deducting therefrom the amount of the funds which is already in his hands, as a debtor to the estate. And the assignee of the legatee, or distributee in such a case, takes the legacy or distributive share subject to the equity which existed against it in the hands of the assignor. *ib*

8. But this principle of equitable retainer, does not apply to a fund arising from the sale of real estate which descended to the debtor as one of the heirs at law of the testator; and which real estate has been converted into personalty by accident, or because the valid portions of the will could not be carried into effect in any other way than by a sale of the land. *ib*

9. The proceeds of real estate, thus converted into personalty, are still to be considered as real estate, and as in no way connected with the funds which come to the hands of the executor for the purposes of the will. *ib*

10. Neither does the right of equitable retainer, on the part of the executor, extend to an interest in the proceeds of real estate which has not come to the debtor under the will of the testator, nor as one of his heirs at law; but which has been derived from another person, to whom such estate had previously descended as one of the heirs of the testator. *ib*

3. *Duty where personal property is bequeathed to a legatee for life, with a limitation over.*

11. As a general rule, where there is a bequest of the whole of the testator's personal estate, or of the residue thereof, after payment of debts and legacies, to one person for life, with a remainder to others after the termination of such life estate therein, the whole must be converted into money and invested in permanent securities by the executor and the income paid over to the person entitled to the life estate. *Spears v. Tinkham,* 211

12. The rule is the same where the residuary bequest for life, or for a limited term, embraces articles not necessarily consumed in the using—such as furniture, books, plate, &c. and also property which must be so consumed; unless the will indicates an intention, on the part of the testator, that the legatee for life shall enjoy the property, or some particular part thereof, in its then state, as a specific bequest. *ib*
13. Whenever specific articles, not necessarily consumed in using, are bequeathed to a legatee for life, with a limitation over, and without any direction to the executor to hold them in trust for the remainder-man, the executor is authorized to deliver the same to the person entitled to a life estate therein; taking from such person an inventory and receipt, specifying that such articles only belong to the first taker for life, and that afterwards they are to be delivered to the legatee who is entitled to them in remainder. *ib*
4. When they may be compelled to give security.
14. The statute authorizing the surrogate to require an executor to give security, where his circumstances have become so precarious as not to afford adequate security for the due administration of the estate, is applicable to the case of an executor who has not sufficient property, exclusive of the contingent interest of his wife in the proceeds of the real estate of the testator, to pay his debts. *Holmes v. Cock*, 426
15. The statute does not fix the amount of the security to be given, by an executor who is irresponsible; except that it cannot be less than twice the value of the personal estate. But where the proceeds of real estate may come into the hands of an executor, by virtue of his trust, for the benefit of others, security in double the amount of such proceeds is not unreasonable, when the executor has become insolvent; unless the amount which is to come to his hands is very large. In that case security to a limited amount beyond the fund to be administered, should be deemed sufficient. *ib*
16. The statute authorizing executors to bring the proceeds of real estate into the surrogate's office, for distribution, is only for the benefit or protection of the executor; and it does not require the executor to place such proceeds in the surrogate's hands, where the real estate is sold under a power contained in the will. *ib*
17. Bond.] Form of the bond to be given by an executor where he is required by the surrogate to give security. The bond given by an executor, under an order of a surrogate, is for the benefit of every person interested in the estate of the testator; and not merely for the benefit of the distributee, upon whose application the surrogate directs security to be given. *ib*
5. Their power to act separately.
18. One of several executors can release a portion of the mortgaged premises from the lien of a mortgage given to the testator, without the concurrence of his co-executors. *Stuyvesant v. Hall*, 151
19. A satisfaction piece, acknowledged by one of several executors, is sufficient to discharge a mortgage given to the testator, and to authorize the cancelment of the registry of such mortgage. *ib*
6. Applications to surrogate for sale of real estate.
20. It is the duty of executors and administrators to retain sufficient of the personal estate of the decedent, in their hands, to pay the expenses of the administration. And they cannot apply to the surrogate for the sale of the real estate of the decedent, to pay such expenses, after the lapse of three years from the time of granting letters testamentary, or of administration, to them. *Fitch v. Whitbeck*, 161
21. All of the executors, or administrators, should join in an application to the surrogate, for an order to sell the real estate of the decedent for the payment of debts. And an order allowing part of the administrators to make such a sale, without the consent or concurrence of the others, is erroneous. *ib*
7. What amounts to a disputing or rejection of a debt.
22. The mere neglect to pay a just debt, by an executor, when he is called on for payment, or even a refusal to pay, upon any other ground than that the debt claimed, or some part thereof, is

not legally or equitably due, is not a disputing or rejection of the debt, within the meaning of the statute; so as to require the creditor to sue for its recovery within six months or be barred. *Kidd v. Chapman*, 414

23. It is the duty of an executor, or administrator, when a claim is presented against the estate of the decedent, to inform the claimant, explicitly, whether he means to reject or dispute such claim, or any part thereof, upon the ground that it is not justly due. Or, if he wishes further time to investigate the justice or legality of the claim, he should apprise the claimant of such wish; and should be prepared to admit or reject the claim, or to refer it, within a reasonable time thereafter. *ib*

8. *How far bound by judgments against testator or intestate.*

24. Although a judgment recovered against a testator is conclusive evidence of his indebtedness at the time of such recovery, so long as the judgment remains unreversed, still it is only prima facie evidence of indebtedness as against his personal representative; as it may have been paid. *ib*

9. *Decrees against them.*

See DECREE, 2, 3, 4.

10. *Accounting before surrogate.*

25. Where a petition was presented to a surrogate, by persons interested in the estate of a decedent, praying that the executors might be required to render an account of the administration of such estate, without asking for a settlement of the account, or for the payment of any balance which might be found due to the petitioners, or for any other relief, and the executors rendered an account accordingly, and the same was finally closed before the surrogate; *Held*, that this terminated the proceedings before the surrogate; and that he had no authority to proceed and settle the account, unless the executors asked for a final settlement thereof, or some person interested in the estate, applied for the payment of his debt, or legacy, or distributive share, so as to render a settlement of the estate necessary, as between the parties. *Smith v. Van Kuren*, 473

11. *When chargeable with interest.*

26 Where an executor mixes up the trust funds with his own, or neglects

to keep regular accounts of the interest received upon such funds from time to time, he is chargeable with interest as if the fund had been kept invested upon interest, payable periodically, and as if the payments had been made by him from the interest and principal thus received, and in hand, when the payments from the trust fund were made by him. And interest should not be computed upon the capital fund for a term of years, with a deduction of the payments, and interest on such payments in the meantime. *Spear v. Tinkham*, 211

12. *Their commissions.*

27. The allowance of commissions, to executors, should be computed upon the aggregate sums received and paid out by all the executors collectively, and not upon the amount received and disbursed by each individual; so that five per cent only shall be charged upon the first \$1000 of the whole estate, and two and a half per cent upon the next \$5000, &c. And the whole commissions should be apportioned among all the executors, equally; or upon some equitable principle, in reference to their respective services in the administration of the estate. *Valentine v. Valentine*, 430

28. Where a trust, held by an executor is inseparable from the executorship, he is not entitled to double commissions, first in his character of executor, and again in his character of trustee. *ib*

See COSTS, 8.

JURISDICTION, 4.

SURROGATE, 1 to 10

F

FAVOR.

See PRACTICE, 4.

FORECLOSURE SUITS.

1. *Affidavit of merits; preference of mortgage causes.*

1. No affidavit of merits is necessary, under the 91st rule, on an appeal from

- a decree of a vice chancellor in a mortgage case, where such decree was in favor of the defendant. *Knickerbacker v. Brintnall*, 71
1. Mortgage cases of the fourth class, are entitled to a preference over other causes of that class, unless an affidavit of merits is filed, and the filing thereof noted on the calendar. *ib*
 2. It is not necessary that a new affidavit should be filed at every term at which the cause is noticed for hearing. But to deprive the complainant of the preference given by the 91st rule, the fact of the filing of such an affidavit must be noted upon the calendar at each term. *ib*
 4. If mortgage causes of the fourth class are not moved at the time that order of business is called for, they lose their preference, and must be heard, with other causes of the fourth class, in the order in which they are placed upon the calendar. *ib*
 5. The preference given to mortgage causes of the fourth class, by the rule of the court, also applies to such causes when they are brought before the chancellor upon appeal, if the decree of the vice chancellor was in favor of the complainant. But where the decree was in favor of the defendant, the legal presumption is that the decree was right; and the cause will not be entitled to a preference although no affidavit of merits is made by the respondent. *ib*
 6. Where the decision was in favor of the complainant in the foreclosure suit, however, a new affidavit of merits must be filed in the appeal cause, as well as noted on the calendar; or the respondent will have the right to claim a preference over other causes of the same class, when that class of causes is reached. *ib*
2. Defence to.
7. It is not a valid defence to a suit in chancery, for the foreclosure and satisfaction of a bond and mortgage given for the purchase money upon a sale of the land, that an ejectment suit has been brought against the mortgagor, by a stranger claiming the land. *Milner v. Avery*, 582
 8. To constitute a good defence to a bill for the foreclosure of a mortgage, on the ground of fraud in obtaining such mortgage, it is necessary not only to show that the defendant was defrauded, but also that he was defrauded by the mortgagee, or his agents; or, at least, to show that the mortgagee, at the time of taking the mortgage, was aware that a fraud had been committed upon the mortgagor. And the several facts necessary to constitute the fraud, and to bring home to the mortgagee the knowledge of it, should be distinctly stated in the answer of the defendant. *Aikin v. Morris*, 140
3. Equitable claims of persons in possession.
9. The equitable claim of a person in possession of mortgaged premises, who has advanced money for the erection of a building thereon, will not be cut off by the foreclosure of the mortgage, and the sale of the premises, unless he was made a party to the foreclosure suit. And he may still enforce such claim against the mortgaged premises in the hands of the purchaser at the master's sale. *De Ruyter v. The Trustees of St. Peter's Church*, 555
 10. Where it does not appear that a person who was in possession of mortgaged premises claiming to have an equitable interest therein, prior to the mortgage, was a party to a suit brought to foreclose such mortgage, the purchaser at the master's sale will be presumed to have bid upon the property with reference to such claim of the tenant in possession; and it will be presumed that the amount of the proceeds of the sale were diminished pro tanto. *ib*
4. Effect of releasing a portion of the mortgaged premises.
11. If a mortgagee of premises which, subsequent to the date of his mortgage, have been sold to different purchasers, in parcels, or incumbered, with full notice of the equitable rights of the subsequent purchasers or incumbrancers as between themselves, releases a part of the mortgaged premises, which in equity is primarily liable for the payment of his debt, he will not be permitted to enforce the lien of his mortgage, against other portions of the premises, without first deducting the value of that part of the premises which has been released by him. *Stuyvesant v. Hall*, 151

5 When mortgaged premises must be sold in the inverse order of their alienation, &c.

12. Where mortgaged premises are sold, subsequent to the date of the mortgage, to different purchasers, in parcels, such parcels, upon a foreclosure of the mortgage, are to be sold in the inverse order of their alienation; according to the equitable rights of the different purchasers, as between themselves, in reference to the payment of the mortgage which is a lien upon the equity of redemption in all the parcels. *ib*

13. The same principle is applicable to subsequent incumbrances, upon different portions of the mortgaged premises, either by mortgage or judgment. *ib*

6. Rights of purchasers of mortgagor's interest.

14. The right which a person acquires by the purchase of all the interest of the mortgagor, in the mortgaged premises, after the mortgagor has suffered a bill of foreclosure to be taken as confessed against him, is subject to the rights which the complainant has acquired in that suit, and to the admissions which the mortgagor has made, by suffering the bill to be taken as confessed. And while the order taking the bill as confessed against the mortgagor remains in force as to him, his grantee cannot set up a defence which the mortgagor himself could not have made, had he continued to be the owner of the equity of redemption. *Watt v. Watt*, 371

7. When mortgagor chargeable with costs personally.

See Costs, 4.

8. Setting aside decree

15. No court, in the exercise of a sound discretion, should set aside a regular decree of foreclosure and sale, for the mere purpose of giving to a defendant a nominal priority in payment, out of the proceeds of the sale of the mortgaged premises, where it appears that the cash value of the property is such that it is wholly immaterial which party is entitled to priority. *De Peyster v. Hildreth*, 109

9. Surplus moneys.

16. Where it does not appear that a person who was in possession of mortgaged premises claiming to have an equitable

interest therein, prior to the mortgage, was a party to a suit brought to foreclose such mortgage, the purchaser at the master's sale will be presumed to have bid upon the property with reference to such claim of the tenant in possession; and it will be presumed that the amount of the proceeds of the sale were diminished pro tanto. Accordingly, the tenant will have no claim upon the surplus moneys arising from the sale of the mortgaged premises, under the decree of foreclosure such proceeds not having been produced by a sale of the equitable interest of the tenant in the premises. *De Ruyter v. The Trustees of St. Peter's Church*, 555

17. Where a person has an equitable lien upon the surplus moneys, arising from the sale of mortgaged premises under a decree of foreclosure, his proper course is to deliver notice of his claim to the master who makes the sale, or to file it with the clerk in whose office the surplus moneys are deposited by the master. Or in case an order of reference has been entered, upon the application of some other claimant, before he is aware of his rights, he should then go before the master, upon the reference, and present and establish his claim there. And where he neglects to do so, without any excuse, the court will not settle his right to such surplus moneys, upon petition. *ib*

FRACTIONS.

It is irregular to insert fractions of a cent in a master's report. *Dumont v. Nicholson*, 71

FRAUD.

See ARBITRATION AND AWARD, 1, 2
FORECLOSURE SUITS, 8.
JURISDICTION, 3.
PLEADING, 1.

FRAUDS, STATUTE OF

See AGREEMENT, 1

FRAUDULENT CONVEYANCES.

Where the consideration of a conveyance is paid by one person, and the convey-

ance is taken in the name of another, for the purpose of defrauding the creditors of the person advancing the money, although such conveyance is valid as between the parties, and vests the whole legal and equitable title in the grantee, it is fraudulent as to creditors. And a creditor, having a judgment against the person advancing the money, may file his bill against the fraudulent grantee, to set the deed aside; so far as to have his judgment satisfied out of the land. But the administrator of the person advancing the money upon the purchase of the land, is not a proper party to such a bill. *Jackson v. Forrest*, 576

FRIVOLOUSNESS.

See PLEADING, 15.

G

GRANT.

A grant of land is void, and passes no title whatever to the grantee, if at the time of the delivery of the conveyance of such lands, they are in the actual possession of a third person claiming under a title adverse to that of the grantor. *Burhans v. Burhans*, 398

GUARDIAN.

See SURROGATE, 14 to 18.

GUARDIAN AD LITEM.

See PRACTICE, 5 to 9.

H

HEARING.

See EVIDENCE.

HEIRS.

I. *Suits by.* See EJECTMENT.

2 When bound by decree against ancestor or his representatives.

1 The act of April, 1843, to amend the act concerning the proof of wills, &c.

was not retroactive in its operation; so as to make a decree against administrators, which had been obtained previous to its passage for a debt due by their intestate, prima facie evidence of the amount of the debt as against the heirs and other persons interested in the real estate of the intestate. *Wood v. Byington*, 387

See DECREE, 2, 3, 4, 5.

3. How deprived of their shares of the estate.

2. To deprive an heir at law, or a distributee, of what comes to him by operation of law, as property not effectually disposed of by will, it is not sufficient that the testator, in his will, has signified his intention that such heir, or distributee, shall not inherit any part of his estate. But to deprive such heir, or distributee, of his share of the property, which the law gives him in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person. *Hazton v. Corse*, 506

HUSBAND AND WIFE.

I. CONVEYANCES FROM WIFE TO HUSBAND.

1. The technical common law rule, that a feme covert cannot make a conveyance to her husband, does not apply to a conveyance made by the wife to her husband, through the medium of a third person. *Meriam v. Harsen*, 232

2. In that manner a feme covert may exercise the same control over her real estate, for the benefit of her husband, as she could if it was held by a trustee, with a power in her to appoint it to whom she pleased. All that the court of chancery will do in such cases, is to see that the wife has not been imposed upon, by her husband, by his taking an unconscientious advantage of her situation. *ib*

II. WIFE'S REAL ESTATE.

3. Where real estate had come to the wife from her father and her grandfather and she had conveyed it to her husband, through the medium of a third person, and the husband afterwards commenced a suit in chancery, in the name of himself and wife, for a partition of a part of the estate, and for other purposes, and the bill stated the original

title of the wife to such real estate, without mentioning the subsequent conveyance of the property to the husband, and an interlocutory decree was made, declaring the rights of the complainants and defendants according to the case made by the bill; which suit was afterwards compromised and settled between the complainants and defendants, and mutual releases executed, conveying the interests of the defendants in certain portions of the property in controversy to the husband; *Held* that, as between the devisees of the husband and the heirs at law of the wife, the devisees were not estopped from showing that the lands actually belonged to the husband at the time of the filing of the bill, and at the time of the entering of the interlocutory decree in such suit. *ib*

III. POWER OF WIFE TO CONVEY HER REAL ESTATE.

4. The rule of the English common law, which disabled a feme covert from conveying her real estate in any other manner than by a fine, or a common recovery, was never in force in the state of New-York. At least no such law has been in existence here since the colonial act of May 6, 1691, was rejected by the crown, in 1697. *ib*
5. The act of February 16, 1771, to confirm certain ancient conveyances, and prescribing the mode of proving deeds, to be recorded, and all the subsequent statutes on the subject, are merely restrictive of the right which a feme covert possessed, by the common or customary law of the colony, to convey her estate by deed, with the concurrence of her husband. *ib*

IV. WIFE NOT ESTOPPED BY HER COVENANT OF WARRANTY.

5. A feme covert, not being bound by a covenant of warranty, contained in a deed executed by her and her husband, jointly, for the purpose of conveying land which the husband holds in right of his wife, such covenant will not operate by way of estoppel, so as to vest an interest subsequently acquired by her, in the grantee in the deed. *Carpenter v. Schermerhorn*, 314

V. SUITS FOR A SEPARATION

1. *Effect of allowing bill to be taken as confessed.*
7. After a bill filed by a husband against

his wife, for a separation, has been taken as confessed, the charges therein are to be taken as true, for the purposes of the suit, so far as relates to alimony, or to an allowance for the expenses of the defence. *Perry v. Perry*, 285

2. Reference to a master.

8. *Object of.*] The reference to a master, in such a case, is only to satisfy the conscience of the court that there is no collusion between the parties; and not to protect the rights of the defendant. And even if the complainant should fail to establish, by legal evidence, the facts charged in the bill, the defendant will not be entitled to a decree for costs, upon a dismissal of the bill, under such circumstances. *ib*

9. *Rights of defendant.*] Upon a reference to a master to take proofs in a suit for a separation, where the defendant admits the charges in the bill to be true, either by answer or by suffering the bill to be taken as confessed for want of an answer, such defendant may appear and cross-examine the witnesses of the complainant, and may produce witnesses to disprove the charges in the bill. For the rights of the defendant are the same upon such a reference, where the charges in the bill are all admitted in the answer, as where they are admitted by neglecting to answer. *ib*

10. *Expenses of cross-examination.*] But where the wife is the defendant, if she attends upon the reference, and cross-examines the complainant's witnesses, such cross-examination must be at her own expense, and not at the expense of her husband. Nor is the master bound to take testimony for the defendant without compensation, in such a case. *ib*

11. *Examination of complainant.*] Where a bill is filed by a wife against her husband, for a separation from bed and board on account of cruel treatment, and an answer on oath is waived, and the defendant suffers the bill to be taken as confessed, the complainant cannot be examined by the master, upon the reference, to prove the acts of cruelty charged in the bill. *Moulton v. Moulton*, 309

12. The object of the 166th rule of the court of chancery was to enable the complainant to make out her case

where the defendant was an absentee, or where he had neglected to answer and make the discovery called for by the bill. And it was not intended to apply to a case where the complainant, by waiving an answer on oath, had deprived the defendant of the benefit of his answer to explain the transactions complained of. *ib*

3. *Decree refused if statute of limitations has attached.*

13. No decree for a separation will be granted where the acts of cruelty set forth in the bill occurred so long since that the statute of limitations has attached. *ib*

4. *Bill may be filed by husband.*

14. The section of the act of April, 1824, giving to a husband the right to file a bill against his wife for a separation, was not repealed in the revision of the statutes in 1830. And the court of chancery is bound to act upon it, whenever a proper case is presented. *Perry v. Perry*, 311

5. *Decree.*

15. In granting a decree for a separation under the act of 1824, in favor of the husband against the wife, the court has no power to direct the husband to pay to his wife an allowance for her support. *ib*

See ALIMONY.
DIVORCE.
PARTIES, 3.

I

IDIOTS AND LUNATICS.

1. *Petition for commission.*

1 The petition for a commission of lunacy against a non-resident, must show that the alleged lunatic is the owner of property situated in this state. It is not sufficient to state that fact in the affidavits annexed to the petition. *Matter of Fowler*, 305

2. *When a new commission may issue.*

2. The court of chancery has the power, in the exercise of a sound discretion, to direct the issuing of a new commission of lunacy, where, from the evidence, or otherwise, there is no doubt

that the jury must have erred in finding that the party proceeded against was not of unsound mind. *Matter of Lasher*, 97

3. *Suspending proceedings, partially.*

3. Where the chancellor becomes satisfied that a person who has been found to be a lunatic, upon an inquisition issued out of the court for that purpose, has so far recovered his reason as to be capable of disposing of his estate, by will, with sense and judgment, he has the power to suspend the proceedings against such lunatic, partially, so as to enable him to make a will. *Matter of Burr*, 208

4. But the chancellor will direct such will to be made under the superintendence of some proper officer of the court, in order to guard such a testator against the immediate exercise of any undue or improper influence. *it*

5. The court of chancery has the power to suspend the operation of a commission and an inquisition, in a case of lunacy, so far as to allow the individual, who had been found to be a lunatic, to make a testamentary disposition of his property; without discharging the proceedings entirely and restoring him to the full control of his property, for every purpose. *it*

4. *Committee entitled to notice of applications.*

6. The committee of a lunatic trustee, or of a lunatic executor, is entitled to notice of an application to the court to remove such trustee or executor. And if the alleged lunatic has no committee, the court will direct the application to stand over until a committee shall have been appointed. *Matter of Wadsworth*, 281

See JURISDICTION, 11 to 16.

IGNORANCE OF THE LAW.

Distinction between ignorance of the law, and a mistake of law. *Hall v Reed*, 500

INFANTS.

1. *Sale of their real estate.*

1. It is not the practice of the court of chancery, to authorize the sale of a

future interest in real estate belonging to infants, except under very special circumstances; nor for the mere purpose of increasing the income of an adult owner of a present interest in the estate. *Matter of Jones*, 22

2. *Allowance to father for maintenance.*

2. It is a settled principle of the court of chancery, not to allow maintenance on behalf of infants, out of their property, unless it will be for their benefit to order such an allowance. And it is not for the benefit of infants to direct an allowance out of their general estate where they have any other sufficient provision for their maintenance, as a right, which can be enforced, to demand it from other sources. *Matter of Kane*, 375

3. The court will not direct an allowance to the father of infants, out of their estate, where he is of sufficient ability to maintain and bring them up without it, in reference to their situation and prospects in life; having a due regard to the claims of others upon his bounty. *ib*

4. The amount of the fortunes of the children, as well as the situation, ability, and circumstances of the father, should be taken into consideration, by the court, in determining the question whether he shall have an allowance out of their property for their support during their minorities. *ib*

5. The English court of chancery formerly adopted a very rigid rule in relation to past maintenance by the father, by refusing to make a retrospective order in any case. *It seems* however that the proper rule here is for the court to direct an inquiry as to the propriety of allowing for past maintenance, where a special case is made; but not to direct such an inquiry, as a matter of course, upon a mere petition showing the inability of the father to support his children, at the time such support was furnished them. *ib*

5. To entitle the father even to an inquiry, as to the propriety of making an allowance for past support of his infant children, he should state a special case, showing the extent of his means, at the time such support was furnished, and the particulars of the extraordinary expenditures, for the actual benefit of the infants, which create an equitable claim in his favor. *ib*

INJUNCTION.

1. *To stay proceedings at law*

1. If a mortgage is usurious, and is a cloud upon the title of the mortgagor, he has a right, under the act of 1837, to come into the court of chancery for the purpose of having the mortgage cancelled. But that will not entitle him to an injunction, to prevent the mortgagee from trying the question of usury, before a jury, in a suit at law upon the bond; unless a discovery is necessary, or some other obstacle exists to the making of the defence at law. *Hartson v. Darenport*, 77

2. A party is not entitled to an injunction to stay proceedings in a suit at law, upon an award, on the ground that the award was obtained by the fraud and corruption of the arbitrators; or that there never was any submission to them as arbitrators. *Snediker v. Pearson*, 107

2. *To prevent pirating of trade-marks.*

3. The court of chancery has the power to interfere, by injunction, to prevent the pirating of trade-marks. *Partridge v. Menck*, 101

4. The question, in such cases, is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, nor whether the article made and sold by the defendant, under the complainant's trade-mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business; and that having appropriated to himself a particular label, or sign, or trade-mark, indicating that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends or customers, or of the patrons of his trade or business, by using his trade-mark without his authority or consent. *ib*

5. Where there is a doubt as to whether the complainant's trade-mark has been actually pirated, in such a manner as to be likely to deceive and impose upon his customers, or patrons, the court will not grant or retain an injunction

until the cause is heard upon pleadings and proofs, or until the complainant has established his right by an action at law. *ib*

- 5 But where the court sees that the complainant's trade-marks are simulated in such a manner as probably to deceive his customers, or patrons, the piracy will be checked at once, by injunction. *ib*

3. Upon a supplemental bill.

7. It is irregular to issue a general injunction *ex parte*, upon a supplemental bill, which injunction is to affect the rights of a defendant who has appeared in the original suit, by a solicitor. *Snediker v. Pearson*, 107

8. The solicitor of the defendant who has appeared in the suit is entitled to notice of the application for an injunction, upon a supplemental bill filed in such suit. *ib*

4. To stay proceedings in courts of other states, &c.

- 9 If the court of chancery has the power, it must be a very special case which will induce it to break over the rule, of comity and policy, which forbids the granting of an injunction to stay the proceedings in a suit commenced in a court of competent jurisdiction in a sister state. *Burgess v. Smith*, 276

5. Upon a bill of discovery.

10. Upon a bill of discovery in aid of the prosecution of a suit at law, an *ex parte* injunction ought not to be granted, where no fact is positively sworn to, as being within the knowledge of the defendant, which, if proved, would defeat the defence in the suit at law, and enable the plaintiff to recover in such suit. *ib*

INSOLVENT CORPORATIONS.

- 1 Where an insurance company is interested in the prosecution of an appeal from a decree of salvage, and a third person, at the request of the corporation, becomes surety for the appellant, and the company becomes insolvent pending the appeal, the surety is not entitled to a priority in payment out of the property of the corporation, in the hands of a receiver, for the money which such surety is afterwards com-

pelled to pay upon the appeal bond; although the liabilities of the corporation were considerably diminished by the result of such appeal. *Matter of the Croton Insurance Company*, 360

12. *Aliter* where a third person becomes surety for the receiver of an insolvent corporation, upon an appeal brought by him for the benefit of the fund to which he is entitled as receiver, or where the fund coming to the hands of a receiver is actually increased to the extent of the moneys which such third person is obliged to pay in consequence of his having become such surety. *ib*

13. A person who pays money as surety for an insolvent corporation, is not entitled to a priority of payment, over other creditors of the corporation, out of its corporate property, in the hands of a receiver appointed by the court of chancery to close up the affairs of the company; but he is entitled to be paid rateably with other creditors, although he is not compelled to pay the claim for which he became liable as surety, until after the appointment of the receiver. *ib*

INTEREST.

See EXECUTORS AND ADMINISTRATORS, 26.

J

JUDGMENT.

1. Docketing.

1. It is not necessary to docket a judgment of the supreme court, to enable the plaintiff to sell the defendant's interest in lands, upon an execution. *Clark v. Dakin*, 36
2. A judgment recovered previous to the passage of the law requiring judgments to be docketed in the several counties, is a lien upon all the lands of the defendant in any of the counties of the state, without being docketed in each county. *ib*
3. The revival of a judgment, by *scire facias*, does not render a second docketing of such judgment necessary, so far as respects the original debt and costs. *ib*

4. Previous to the revised statutes, a judgment in a court of record, in this state, was a lien upon the lands of the judgment debtor from the time of the entry thereof; whether docketed or not. But if the judgment was not properly docketed, it did not affect the lands of the judgment debtor, as against subsequent purchasers or mortgagees. *Buchan v. Sumner.* 165
 5. But even as to them, the undocketed judgment was entitled to priority in equity, if the purchaser or mortgagee had notice of its existence at the time of his purchase, or when he took his mortgage *ib*
 6. And the first judgment was entitled to a preference, although not docketed, over the lien of a junior judgment which had been docketed. But if the land of the debtor had been sold by the sheriff, under an execution upon the junior judgment, to a purchaser who had no notice of the prior judgment, such purchaser took the land discharged of the lien of the elder judgment. *ib*
 7. But under the revised statutes, no judgment will affect any lands, tenements, real estate, or chattels real, or have any preference as against other judgment creditors, until the record thereof has been filed and docketed. *ib*
 - 8 The effect of the new provisions of the statute, is to prevent the common law lien of the judgment from attaching at all upon the real estate of the judgment debtor until his judgment has been actually docketed; and not merely to protect bona fide purchasers and incumbrancers who had no notice of the existence of the judgment when their interest in, or liens upon, the real estate of the debtor accrued. And the provisions of the act of May 14, 1840, on this subject, are also in accordance with this construction of the revised statutes. *ib*
 9. The fact that an error, which occurred in the docketing of a judgment, was the error of the clerk, and not the fault of the judgment creditor, or of his attorney, will not authorize the court of chancery to interfere, to deprive another judgment creditor of his legal priority, if he has obtained one, by such error. *ib*
 10. Although the statute respecting the docketing of judgments does not declare, in express terms, that the judgment shall be entered by the clerk, in the alphabetical docket, under the letter corresponding with the surname of the judgment debtor, yet such has been the practical construction which has been given to the statute for more than a quarter of a century; and it is the only sensible construction which can be given to it. *il*
 11. It was accordingly *Held*, that the docketing of a judgment against P. S., under the letter P., the initial letter of his christian name, instead of the letter S., the initial of his surname, was not even a substantial compliance with the requirements of the statute. *il*
 2. *Lien of, how controlled by court of chancery.*
 12. The general lien of a judgment creditor, upon the lands of his debtor, is subject to all equities which existed against such lands, in favor of third persons, at the time of the recovery of the judgment. And the court of chancery will so control the legal lien, of the judgment creditor, as to restrict it to the actual interest of the judgment debtor in the property; so as fully to protect the rights of those who have a prior equitable interest in such property, or in the proceeds thereof. *ib*
 13. It is a settled principle in the court of chancery, that the general lien of a judgment, upon the real estate of a debtor, is subject to all the equities which existed in favor of such real estate, in favor of third persons, at the time of the recovery of such judgment. And a court of equity will so control the legal lien, of the judgment creditor, as to protect the rights of those who have prior equitable interests in, or liens on, such property, or the proceeds thereof *Wilkes v. Harper,* 335
 3. *Who bound by.*
 14. The interest of a person holding a contract for the purchase of land, is not bound by the docketing of a judgment against him. *Boughton v. The Bank of Orleans,* 458
- See EXECUTORS AND ADMINISTRATORS, 24.
- ## JURISDICTION OF CHANCERY.
1. *Of a suit against a grantor, for disturbing a grantee in his possession.*
 - 1 Where a party claims title to property

- under a recent conveyance from the defendant himself, he is not obliged to bring a suit at law, against the grantor, for disturbing him in his possession, in violation of the express provisions of his grant, before applying to the court of chancery for relief. It is only where the right of the complainant to the privilege claimed admits of doubt, that the court requires him to establish his right at law previous to the granting of an injunction. *The Seneca Woollen Mills v. Tillman*, 9
- 2 To decree a will void; without an issue.
- 2 Whether the court of chancery has jurisdiction to decree a will void, except by consent of parties, without awarding an issue *devisavit vel non*? *Quære. Clarke v. Sawyer*, 411
- 3 Where there is a want of jurisdiction in the court to declare a will void, upon a bill filed for that purpose, the bill should not be dismissed absolutely, so as to bar the complainant's rights; but it should be dismissed without prejudice to his rights at law. *ib*
- 4 Where a testator has been induced to make a will in consequence of a gross fraud practised upon him, by means of a conspiracy, the court of chancery has power, by consent of parties, to make a decree declaring the same void, and that it was obtained by fraud and imposition, so far as relates to the parties to the suit. *ib*
- 3 To remove executors.
- 6 Whether the court of chancery has the power to remove an executor, upon a mere petition presented by some of the persons interested in the estate, and without the institution of a suit for that purpose? *Quære. Matter of Wadsworth*, 381
- 6 The committee of a lunatic executor is entitled to notice of an application to the court to remove such executor. And if the alleged lunatic has no committee, the court will direct the application to stand over until a committee shall have been appointed. *ib*
- 4 Trusts and Trustees.
- 7 The common law has made no provision for the execution of a joint trust by one of the trustees, where the co-trustee, by reason of lunacy or other inability, becomes incompetent to execute the trust. *f*
- 8 In such a case it is proper for the court of chancery to interfere, to remove the lunatic trustee, under the provisions of the revised statutes; so that the trust may be executed, either by the remaining trustee, or by him and such other person as may be substituted in the place of the lunatic. *ib*
- 9 Where a single trust is created, it is not competent for the court of chancery to remove one of the trustees from a part of the trust, and to appoint another in his place, to act with the co-trustees in part only. *ib*
- 10 But where separate and distinct trusts are created by a testator, as to different portions of his property, and for the benefit of different persons, and which trusts are separate and distinct from the trusts and trust powers which are conferred upon the trustees in their character of executors, one of the trustees may decline one of the trusts attempted to be conferred upon him, and may accept another of such trusts, and may take out letters testamentary and assume the duties of an executor. *ib*
- 11 A lunatic trustee, who is also an executor, may be removed from his office of trustee of a special trust not connected with his executorship, without interfering with a trust conferred upon him as executor. *ib*
- 5 Idiots and lunatics.
- 12 The court of chancery has the power, out of the surplus income of the estate of a lunatic, to provide for the support of persons not his next of kin, and whom the lunatic is under no legal obligation to support; where it satisfactorily appears to the chancellor that the lunatic himself would have provided for the support of such persons, had he been of sound mind. *Matter of Heenev*, 326
- 13 The court may also make an allowance, out of the income of a lunatic's estate, for the education of persons whom he had adopted as children, while he was in a sound state of mind. *ib*
- 14 And the committee of the lunatic may be authorized to provide for the keeping up of the lunatic's family establish-

- ment, with the same number of domestics as had been customary previous to the lunacy, and to expend for that purpose, annually, an amount not exceeding that which had been annually expended by the lunatic himself before his lunacy. *ib*
15. The committee may also be authorized, by the court, to place at the lunatic's disposal, so long as he is competent to judge of the claims of applicants, small sums of money for purposes of charity. *ib*
16. And the court may also authorize the committee to pay for the support of the institutions of religion, in the church where the lunatic and his family have been accustomed to worship, such sums from time to time as the lunatic may desire him to pay for that purpose, not exceeding the amount which the lunatic had been in the habit of paying annually, before his faculties became impaired. *ib*
17. But the committee will not be allowed personally to expend any part of the estate of the lunatic for general charity, or objects of benevolence, or piety, for which the lunatic himself had not been in the habit of contributing specifically and regularly, while he was competent to manage his own affairs. *ib*
6. *On a bill of discovery in aid of a suit in a sister state, or in a foreign tribunal.*
18. The court of chancery, in this state, has jurisdiction, and will entertain a bill of discovery in aid of the prosecution of a civil suit, in a sister state, or in a foreign tribunal, or in a court of the United States. *Burgess v. Smith*, 276
19. But it will not entertain such a bill when filed against a person who is not a party to the suit in which the discovery sought for is to be used; even though such person is the substantial party in interest in the defence of that suit. *ib*
- See INJUNCTION*, 10.
7. *To enforce liens.*
20. The court of chancery may enforce an equitable lien, either upon a legal, or upon an equitable estate in lands. *Buchan v. Sumner*, 165
21. And where the common law or a statute, creates a lien upon a legal interest in land, the court of chancery, by analogy, sometimes declares and enforces a similar lien upon an equitable estate therein. *ib*
22. But where the lien is created by statute, and the lien itself, as well as the estate against which it is sought to be enforced, is purely legal, chancery is not authorized to extend the lien to cases not provided for by the statute. *ib*
8. *To restrain a purchaser at a sheriff's sale from taking a deed.*
23. *S. & W. H.* executed a bond and mortgage, to the complainants. At the time of the giving thereof, *S. S. & Co.* were the holders of a judgment against the mortgagors, which was a lien upon the mortgaged premises, and upon other real estate of the mortgagors. An execution had been issued upon that judgment, and levied upon a store of goods. The complainant had notice of that judgment. Subsequently to the execution of the mortgage to the complainant, *S. S. & Co.* issued a second execution upon their judgment, and made an arrangement with the defendants therein by which they withdrew the first execution from the hands of the sheriff. The result of this arrangement was to give other executions, then in the hands of the sheriff, a preferable lien upon the personal property of the mortgagors, and to subject their real estate, upon a part of which the complainant's mortgage was a lien, to liability for the amount due on that judgment. The agent of *S. S. & Co.*, after leaving their second execution dormant in the hands of the sheriff for about fifteen months, caused the mortgaged premises to be advertised and sold thereon, and purchased them, in the name, and for the benefit, of *S. S. & Co.* Previous to that sale, the complainant had filed his bill in this cause to foreclose his mortgage, making *S. S. & Co.* parties. And he had obtained a regular decree, which gave his mortgage a preference over their judgment; they having neglected to appear in the cause. The mortgaged premises were advertised to be sold under that decree, or the 30th of July, 1846; previous to which time *S. S. & Co.* applied to the chancellor to open their default, and the decree, and for leave to them to appear, and

put in an answer. The chancellor took time to consider the application; and in the meantime he directed the master to proceed and sell the premises according to the directions in the decree. The master sold the mortgaged premises on the 12th of September, 1846, and they were b'd in by the complainant, and were conveyed to him: and the report of the sale was duly confirmed. On the 6th of October, 1846, the chancellor denied the application of S. S. & Co., without reserving to them any right to renew it. On the 1st day of February, 1847, S. S. & Co. applied to the court for leave to renew their motion to open their default, and the decree of foreclosure in this cause; or that the complainant might be decreed to redeem their judgment. After the decision of the chancellor upon the first application, and before notice was given of the second, the complainant sold and conveyed a portion of the premises purchased by him at the master's sale, to T. A. L. The complainant, in his affidavit in opposition to the second application, stated that he believed it was the intention of S. S. & Co. to cast a cloud upon his title by taking a conveyance from the sheriff upon the sale under their judgment. He therefore asked for an order, on the foot of the decree, restraining them from doing so. *Held*, That the court was not authorized, upon this application, to make an order to restrain S. S. & Co. from taking a sheriff's deed upon the sale under their judgment. That if any relief of that kind was necessary, the proper remedy for the complainant was to file a bill against S. S. & Co., after they should have taken such deed, to remove the cloud thus cast upon the title. That it was equitable, as to the complainant, for S. S. & Co. to consent to withdraw the first execution from the hands of the sheriff, so as to discharge the personal estate which the defendants in the judgment had at the time of issuing that execution, and to leave their judgment to be satisfied out of the real estate which had previously been mortgaged to the complainant. *De Peyster v. Hildreth*, 109

A To order a demand to be paid to a stranger to the suit.

24. The court of chancery has no jurisdiction, upon the petition of a stranger to a bill, that court, to order a de-

mand which he has against a firm in which the defendants in such suit are partners, to be paid to him, out of funds in the hands of the receiver in the suit. *Matter of Ingraham*, 35

25. The remedy of a person having an equitable claim to funds thus situated is to file a bill, making the complainants in such suit, and the several members of the firm, defendants, after having exhausted his remedy at law, against his debtors by judgment and execution. *ib*

See ASSIGNOR AND ASSIGNEE, 1, 2, 3.
INJUNCTION, 3.
JUDGMENT, 12, 13.
SURROGATE, 1.
VICE CHANCELLORS.

L

LEGATEES.

See LIENS.

LIENS.

1. In all cases, in respect to mere equitable liens, the maxim prevails, in the court of chancery, that he who is prior in time is stronger in right. *Wilkes v. Harper*, 338
2. Legatees, whose shares of the personal estate of the testator have been wasted by the executor, have no specific equitable lien therefor upon the real estate to which such executor is entitled as a devisee of the testator, to make good their loss. Nor are such legatees, on that account, entitled to a priority over the legal liens which other creditors of the executor have acquired, upon such real estate, by judgment. *ib*
3. Neither will the receipt, by an executor, for the mere purpose of distribution, of the shares of devisees, of the purchase money of real estate sold by him as their agent, give them a lien upon real estate devised to such executor. *ib*

See JUDGMENT, 12, 13.
JURISDICTION, 20, 21, 22

LIMITATIONS, STATUTE OF

1. The exceptions in the statute of limitations of 1801, relative to actions which

concern the trade of merchandize between merchant and merchant, their factors or servants, does not apply to a bill in chancery for an account and settlement, and for the payment of a balance due from one mercantile firm to another, by reason of joint adventures in which the two firms had been engaged; where all the items of the account, on both sides, were more than six years previous to the filing of the bill. In such a case the statute is a bar. *Didier v. Davison*, 477

2 Where a right of action accrued previous to 1830, it is to be governed by the act of 1801 for the limitation of actions, and not by the new provisions of the revised statutes on the subject; although the defendant has promised to pay the debt whenever he should be able to do so, and the bill does not show such ability previous to 1830. *ib*

3 Where a debtor, who is absent from the state at the time the cause of action accrues against him, afterwards comes into this state, and is here publicly and openly, so that by reasonable diligence his creditor might have commenced a suit against him, it is a return into this state within the meaning of the fifth section of the act of 1801 for the limitation of actions. *ib*

4. But a mere clandestine return of the debtor, which will not enable the creditor, with ordinary diligence, to serve process upon him, is not such a return as will cause the statute of limitations of 1801 to commence running against the demand, so as to bar it in six years from such return to this state. *ib*

5. The open residence in this state, for three or four years, of one of two joint debtors, who were absent at the time the cause of action accrued, and the subsequent residence in this state of the other joint debtor, is such a return of both debtors to this state as was contemplated by the statute; although in point of fact their creditors were not aware of the residence of either of such debtors in this state. *ib*

6. Under the act of 1801, if the debtor was in this state at the time the cause of action accrued against him, or came here subsequently, so that the statute once began to run against the demand, it continued to run, notwithstanding he departed from the state within the six

years; and no subsequent disability would stop it. *ib*

7. Even the death of either of the parties, after the statute once commenced running, would not prevent the limitation from attaching; except in cases which were provided for by some other statutory provision. *ib*

8. Under the provisions of the old statute of limitations, the return of one of two joint debtors into the state, after the right of action had accrued against both, and his subsequent death within the six years, will not bar the right of action against the survivor, who does not come into the state until within six years of the time when the suit is brought against him. *ib*

9. By the provisions of the revised statutes, where the right of action against a debtor accrued subsequent to the time when those statutes took effect he must have continued to reside within this state for six years, to render the act of limitations a bar to the suit; and the time he has resided out of the state after the right of action accrued is not to be taken into the account, in the computation of the time within which the action must be commenced. *ib*

See HUSBAND AND WIFE, 13.

LIS PENDENS

The commencement of a suit in chancery is only constructive notice, of the pendency of such suit, as against persons who have acquired some title to, or some interest in, the property involved in the litigation, under the defendants, or some of them, *pendente lite*. *Stuyvesant v. Hall*, 151

M

MAINTENANCE.

See INFANTS, 2 to 6.

MASTER'S DEED.

The recording of a master's deed of premises sold by him under the decree in a foreclosure suit is constructive no-

tice to all subsequent purchasers from any of the parties to the decree, that the rights which such parties had in, or the liens which they had upon, the mortgaged premises, at the time of the decree, were cut off by the master's sale. *De Peyster v. Hildreth*, 109

MASTER'S REPORT.

- 1 It is irregular to insert fractions of a cent, in a master's report. *Dumont v. Nicholson*, 71
2. Where a mere error in calculation has occurred in a master's report, the court of chancery, upon further directions, may direct the report to be amended; although no exceptions have been filed, and without sending such report back to the master to be corrected; but where the report has been followed by an order, or decree of the court, for the payment of the balance as found due by the master, the report cannot be amended while the order or decree founded thereon remains in full force. *The Utica Insurance Company v. Lynch*, 573

See PARTITION, 4.

MAXIMS.

- 1 In all cases, in respect to mere equitable liens, the maxim prevails, in the court of chancery, that he who is prior in time is stronger in right. *Wilkes v. Harper*, 338
2. As between mere equitable claims, he who is first in time is superior in right. *Cherry v. Monro*, 618

MERGER.

It seems that a verbal agreement made by the grantee of land, at the time of the conveyance thereof to him with warranty, cannot be set up, either at law or in equity, as a defence to a suit for a breach of the covenant of warranty contained in such conveyance; and that all verbal agreements which would be inconsistent with the general covenant of warranty against all persons, must be considered as merged in the written covenant. *Miller v. Avery*, 582

MISTAKE.

1. Courts will sometimes grant relief against a *mistake* of the law, where it can be done without impairing the rights of those who were ignorant of the existence of any such mistake, when their rights accrued. *Hall v. Reed*, 500
2. Distinction between *ignorance* of the law, and a *mistake* of law. *ib*

MORTGAGE.

1. *Bill to cancel for usury.*
1. If a mortgage is usurious, and is a cloud upon the title of the mortgagor, he has a right, under the act of 1837, to come into the court of chancery for the purpose of having the mortgage cancelled. *Hartson v. Davenport*, 77
2. *Nature and incidents of.*
2. Although the rule in England is that a mortgage in fee transfers the legal title to the land itself, as a conditional fee, so that if the condition of the mortgage is not complied with, by the payment of the money at the day, a reconveyance is necessary to vest the title of the land in the owner of the equity of redemption, though the debt is subsequently paid; yet in this state the mortgagor is considered the real owner of the fee of the mortgaged premises, except for the mere purpose of protecting the mortgagee as the holder of a security thereon for the payment of his debt. And the only right the mortgagee has, in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. *Waring v. Smyth*, 119

3. In this state, a mortgage is nothing but a chose in action; or a mere lien or security upon the mortgaged premises, as an incident to the debt itself. And where the mortgagee has released or discharged his debt, by an improper and voluntary alteration or destruction of the bond and mortgage, by which it was secured, he ought not to be permitted to sustain a suit, in any court, for the recovery of his debt. *ib*

3. *Recording; how far notice.*

See RECORDING ACTS.

4. *What amounts to notice to mortgagee.*

4. What amounts to constructive notice, to the mortgagee, of previous conveyances, or incumbrances. *Stuyvesant v. Hall*, 151

5. *Priority of mortgages.*

5. Where two mortgages, upon the premises, are recorded at the same time, and each mortgagee is cognizant of the giving of the other mortgage, at the time that he takes his own, the recording acts have no application to the case, in respect to the question of priority. *Jones v. Phelps*, 440

6. Although two mortgages upon the same premises, given to different persons, bear the same date, and are acknowledged at the same time, if it appears that it was the agreement and intention of all parties that one of the mortgages should have a preference over the other, so as to be a prior lien upon the premises, the law, for the purpose of carrying into effect that intention, presumes that the mortgage which was intended to be preferred, was delivered first. *ib*

6. *Recording assignment; how far notice.*

7. The mere recording of the assignment of a mortgage, is not of itself legal notice to the mortgagor, of such assignment; so as to invalidate a payment, made by him, or his heirs, or representatives, to the assignor. *The New-York Life Insurance and Trust Company v. Smith*, 82

8. The recording of the assignment of a mortgage is only constructive notice of such assignment, as against persons claiming by virtue of some subsequent assignment or conveyance from the mortgagee, or assignor of the mortgage, or his representatives. *ib*

7. *Release of lien.*

See EXECUTORS AND ADMINISTRATORS, 18, 19.

8. *Implied covenants for payment of debt.*

9. Where a mortgage is taken for the security of a pre-existing indebtedness, without any intention of discharging the original debtor from personal responsibility upon his former security, his liability upon that security will remain, notwithstanding the debt is further secured by such mortgage. But if the

original indebtedness is intended to be discharged, and a mere mortgage is taken, to secure the amount of the debt, without any express covenant to pay the same, and no bond or separate instrument is given to secure such payment, the mortgagee has no remedy upon any implied agreement of the mortgagor to pay the amount secured by the mortgage; but he must resort to the land alone, or to the proceeds thereof, for payment. *Hone v. Fisher*, 55;

10. The result is the same where an absolute deed is taken, as a mere security for the re-payment of the amount of the consideration of such deed, instead of an ordinary mortgage; and where there is no covenant or other instrument rendering any one personally liable for the debt intended to be secured by such absolute deed. *ib*

9. *Charging mortgagor personally, with the payment of the mortgage debt.*

11. A person who purchases land subject to the payment of a prior mortgage thereon, has no legal right to have the mortgage debt charged upon the mortgagor personally, instead of charging it on the land upon which it was charged by the mortgage. *Cherry v. Monro*, 618

10. *Priority of payment, out of mortgaged premises.*

12. Where the complainant in a foreclosure suit has obtained a decree, where by he has secured to himself the legal priority of payment out of the proceeds of the mortgaged premises, he will not be deprived of such priority, in favor of prior judgment creditors who have lost the opportunity to have their judgment satisfied out of other property of the mortgagor by their own acts, and by their negligence. *De Peyster v. Hildreth*, 109

See ALTERATION OF INSTRUMENTS.

MULTIFARIOUSNESS.

See DEBTS. 1.

N

NON-IMPRISONMENT ACT

See DEBTOR AND CREDITOR.

NOTICE.

See LIS PENDENS.
MORTGAGE, 4.
POSSESSION.

O

ONUS PROBANDI

See ALTERATION OF INSTRUMENTS, 4.

P

PARTIES.

1. *Associates, or shareholders.*

Where the associates, or shareholders, of a private association are numerous, a bill may be filed by one of such associates, in behalf of himself and all the others against the trustees of such association, to compel the execution of the trust, and for an account and distribution of the funds and property of the association among the shareholders. And it is not necessary that all the associates should unite in a bill for that purpose. *Mann v. Butler*, 362

2. *Trustees and cestuis que trust.*

2. Where the legal title to trust property is in the trustees, so that a decree directing a sale of the property, either by the trustees or by a receiver, will give a good and valid title to a purchaser, if the cestuis que trust are numerous, or if some of them are unknown, it is not necessary to make them all parties to a bill to compel the execution of the trust, and for an account and distribution; but a party may sue in behalf of themselves and others. And the court will see that the rights of all to their distributive shares of the trust fund are protected by the decree in the cause. *ib*

3. *Husband and wife.*

3. Where a suit at law is brought against the husband and wife, for the purpose of affecting her interest, she is a necessary party to a bill in chancery, by the husband, for an injunction to restrain proceedings in the suit at law. *Booth v. Albertson*, 313

4. *On appeal.*

4. The complainant in a suit is a necessary party to an appeal from an order of a vice chancellor, granting leave to file the bond of the receiver in such suit *nunc pro tunc*. *Whiteside v. Prendergast*, 471

5. *In partition suits.*

5. A decree for a partition cannot be made unless all the persons interested in the premises are made parties to the suit. *Burhans v. Burhans*, 398

6. *Executors and administrators.*

6. Where real estate has been purchased by a person, since deceased, for his own use and benefit, and a conveyance taken in the name of F., the latter is not a proper party to a bill filed by a creditor of the decedent, against his administratrix for an account and payment of the complainant's debt, out of the personal estate which had come to her hands; and the administratrix is not a proper party to a suit to have the complainant's debt paid out of the real estate of the decedent, the title to which was taken in the name of F. *Jackson v. Forrest*, 576

See FRAUDULENT CONVEYANCES.

7. *Who may object to misjoinder.*

7. A defendant in the court of chancery cannot object that another defendant, having no interest in the subject matter of the suit, is improperly made a party. *Cherry v. Monro*, 618

8. It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendant is improperly joined with him in the suit. *ib*

8. *Demurrer for misjoinder.*

9 A defendant cannot demur to a bill, for the misjoinder of other persons as co-defendants. *Whitbeck v. Edgar*, 106

See ASSIGTOR AND ASSIGNEE

PARTITION.

1. *Effect of a voluntary partition.*

- A voluntary partition, of the interests of several persons in lands, without warranty, will, as between such persons, only give to each one the rights and interest, either vested or contingent, which he and the others then have in the lands set off in severalty. *Carpenter v. Schermerhorn*, 314

2. And a further interest in the land set off to others, which one of the parties afterwards acquires as the heir at law of some of his children who had a remainder in fee in the premises, not being either a vested or a contingent interest in him, at the time of the partition, but a mere chance of his succeeding to the same, as an heir at law of his children, does not enure to the benefit of the other parties to the partition in respect to the lands set off to them. *ib*

See DEED, 7.

2. *Shares of infants.*

3. The shares of infant defendants, in the proceeds of the sale of premises in a partition suit, ought not to be paid to their guardians ad litem; but should be brought into court, and invested, for the benefit of such infants. *ib*

3. *Master's report.*

4. Where the master's report, in a partition suit, shows the actual interests of the several parties in the premises, it is not necessary to send the report back to the master to correct an erroneous estimate which he has made in relation to such interests; but the error may be corrected by the decree. *ib*

4. *Possession, and interest of the parties.*

5. A party applying for a partition of lands must not only have a present estate in the premises, of which partition is sought, as a joint tenant or a tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises. *Burhans v. Burhans*, 398

5. *Rents and profits.*

- 6 Rents or profits of premises sought to be partitioned, accruing while the land has been held adversely to the claim

of the complainant, even if such rents and profits have been received by one who was a joint owner of the premises with the complainant, are not recoverable in the court of chancery, upon bill for partition. They are more properly recoverable as mesne profits, in an ejectment suit brought for the recovery of the possession of the undivided share of the premises claimed by the plaintiff. *ib*

See PARTIES, 5.

PARTNERSHIP.

I. HOW CONSTITUTED.

1. In this state, no written articles are necessary to constitute a copartnership, which is to take effect immediately; although a written agreement may be necessary to bind the parties to enter into a future copartnership which is not to commence until after the expiration of a year. *Smith v. Tarlton*, 336
2. But even where there is a parol agreement to enter into a copartnership at a future day, and specifying the terms of such copartnership, *it seems* that if the parties go into copartnership at the prescribed time without agreeing upon any new terms, the former parol agreement will be presumed to constitute the terms upon which such copartnership was entered into and carried on. *ib*

II. VALIDITY OF.

3. A copartnership which is entered into and commenced immediately is not invalid although one of the declared objects of the copartnership is to purchase real estate for the purposes of the firm, and as a site for the transaction of its business. *ib*

III. PARTNERSHIP EFFECTS.

1. *How to be applied.*

4. It is a settled principle of the law of partnership, that the partnership effects are to be first applied to the payment of the debts of the firm, and to equalize the claims upon the different copartners in relation to the fund. In other words, the separate estate or interest of a copartner in any of the copartnership property, is only his share of that part of the copartnership effects, or of the proceeds thereof, which re

mains, after the debts of the firm and the demands of his copartners, as such, are satisfied. *Buchan v. Sumner*, 167

2. Interest of each partner in.

- 5 If one of the copartners has paid more than his share of the partnership debts, he has a claim upon the partnership property, which in equity is paramount to the claims of the separate creditors of his copartner. *ib*

3 How far liable to separate creditors.

- 6 The separate creditors, of individual partners, have no equitable right to any part of the partnership property until the debts of the firm are provided for, and the rights of the partners, as between themselves, are fully protected. *ib*

IV. REAL ESTATE.

1. Nature of the title by which it is held.

7. Where real estate is conveyed to copartners, in their individual names, for the use and benefit of the firm, or is so conveyed to them in payment of debts due to the partnership, the legal title vests in the grantees thereof, as in an ordinary conveyance of real estate. And, by the common law, where land was purchased with copartnership funds, for copartnership purposes, and was conveyed to all the partners, generally, in fee, it would, at law, create a joint tenancy; so that neither could convey any more than his share of the land, during the lives of his copartners. And upon the death of either of the copartners, without having severed the joint tenancy by a conveyance, the legal title to the whole of the land would survive to the other copartners. *ib*

8. But under the statutes of New-York relative to joint tenancies, the several copartners, to whom such a conveyance was made, would become tenants in common of the legal title. And upon the death of either, the undivided portion of the legal title, thus vested in the deceased partner, would descend to his heirs at law; without reference to the equitable rights of the several partners, in the land, as a part of the property of the firm. *ib*

2. Belongs to all the partners, collectively.

9. Where real estate is purchased with partnership funds, for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, such real estate in England is considered and treated, in equity, as the property of the members of the firm collectively; and as liable to all the equitable rights of the partners, as between themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those who are beneficially interested in the fund; not only during the existence of the copartnership, but also upon the dissolution thereof. *ib*

10. Real estate purchased with partnership funds, for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm, for the payment of its debts, and for the purpose of adjusting the equitable claims of the copartners as between themselves. *Smith v. Tarlton*, 336

3. Whether considered as personal, or real estate.

11. It is the general rule, in England, that real estate belonging to a copartnership, unless there is something in the partnership articles to give it a different direction, is to be considered in equity as personal property; and upon the death of one of the copartners, and after the debts of the firm have been paid, and the equities have been adjusted between the several members of the firm, it goes to the personal representatives of the deceased partner, and not to his heirs. *Buchan v. Sumner*, 167

12. The American decisions, in respect to real estate purchased with partnership funds, or for the use of the firm, establish two principles: *First*, that such real estate is in equity chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another, upon the winding up of the affairs of the firm; *Secondly*, that, as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after pay

ing the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is to be considered and treated as real estate. *ib*

4. *The legal title.*

13. Although a court of equity considers and treats real property as a part of the stock of the firm, it leaves the legal title undisturbed, in this state, except so far as is necessary to protect the equitable rights of the several members of the firm therein. *ib*

5. *Purchasers entitled to protection.*

14. And a bona fide purchaser, or mortgagee, who obtains the legal title to partnership lands, or to an undivided portion thereof, from the person who holds such legal title, and without notice of the equitable rights of others in the property, as a part of the funds of the copartnership, is entitled to protection in courts of equity, as well as in courts of law. *ib*

PAYMEN

See DEED, 1, 2.

PERSONAL DISABILITIES

See EJECTMENT.

PETITION.

See IDIOTS AND LUNATICS, 1.

PIRACY.

See INJUNCTION, 3, 4, 5, 6.

PLEADING.

I. BILL.

- 1 In a bill for relief on the ground of fraud, it is not necessary that the complainant should allege that he has discovered the fraud complained of, within six years. And a demurrer will not lie to such a bill, although it appears that the fraud occurred more than six years before the commencement of the suit, unless it also appears, at least by

necessary intendment, that the fraud was discovered, by the party aggrieved, more than six years before he filed his bill for relief. Where that does not appear, the defendant must be left to make his defence by plea, or answer, so as to present an affirmative issue, upon the question as to the discovery of the fraud by the complainant. *Radcliff v. Rowley*, 23

II. ANSWER

1. *Separate, when proper.*

2. In what cases it is proper for several defendants, who appear by the same solicitor, to put in separate answers. *Pentz v. Hawley*, 552

2. *Effect of waiving an answer on oath.*

3. Where an answer on oath is not waived, matters stated in the bill as being within the personal knowledge of the defendant are to be taken as true, upon the hearing. But not where the complainant, by waiving an answer on oath, elects to take upon himself the burthen of sustaining the allegations in his bill without the aid of a discovery from the defendant. *Miller v. Aeery*, 583

4. Where an answer on oath is waived by the complainant, the answer is a mere pleading; and the general traverse at the conclusion thereof puts every thing in issue which is not admitted by the answer; as provided for by the 40th rule of the court of chancery. *ib*

5. A complainant cannot avail himself of a part of the new matters which are set up in the defendant's answer, as a mere pleading, to make out a case for relief not stated in his bill, and at the same time reject other matters connected therewith as a part of the defence stated in the answer. *ib*

III. PLEA.

6. Where a bill is defective on its face in consequence of the statement of facts which show that the claim of the complainant cannot be sustained, it is improper for the defendant to plead those facts in bar of the discovery or relief sought. *Sperry v. Miller*, 532
- 7 When the bill shows that the complainant has no right to an answer, &c.

any purpose, the proper course for the defendant is to demur; instead of pleading a new fact in bar. For, upon the argument of a plea, either as to the discovery or the relief sought by the complainant's bill, the defendant cannot sustain his plea, in the court of chancery, by showing that the bill itself would have been bad upon demurrer. *ib*

IV. DEMURRER.

1 What objections may be raised by.

8. The objection that the complainant has submitted to the master's report, upon exceptions taken to the answer to the original bill, and that the amendments to the bill do not make a new case calling for a further discovery, cannot be raised by demurrer to the discovery sought by such amended bill. *Chazournes v Mills*, 466

2. To amended bill.

- 9 Upon a demurrer to an amended bill, if any part of the discovery covered by such demurrer appears to be material and proper, for any purpose of the suit, the demurrer will be overruled. And the defendant cannot, upon the argument of the demurrer, insist that the discovery called for is contained in his former answer. *ib*

3. Form of.

10. Upon a general demurrer to a bill, for relief upon the ground of fraud, it is not necessary to inquire whether some grounds of relief stated in the bill do not appear, upon the face thereof, to be barred by the lapse of time. If that question is sought to be raised, on demurrer, it must be done by a separate demurrer to those particular parts of the bill. *ib*

11. A demurrer to the whole bill does not lie merely because the prayer for relief is too broad. The proper course, in such a case, is to demur to the part of the relief, specifically prayed for, to which the complainant is not entitled, upon the case made by his bill. *Whitbeck v. Edgar*, 106

4. For misjoinder of parties.

12. A defendant cannot demur to a bill, for the misjoinder of other persons as co-defendants. *ib*

5. Putting in after extension of time to answer.

13. After a defendant has obtained a chamber order from a vice chancellor granting him further time to answer, he cannot put in a demurrer to the bill, without special leave of the court. *Bedell v. Bedell*, 99

14. But this principle does not apply to a case of the extension of the time by the voluntary stipulation of the complainant's solicitor. *ib*

15. If, however, under a stipulation extending the time to answer, a defendant puts in a demurrer which is clearly frivolous, it will be taken from the files. *ib*

POSSESSION.

Where a person who has an equitable interest in a building erected upon premises belonging to another, by having advanced money for the erection thereof, is in possession of the premises, under an agreement with the owner, at the time of the execution of a mortgage thereon to a third person, and continues in possession down to the time of the sale of the premises, by a master, under a decree obtained in a suit brought to foreclose such mortgage, the complainant in the foreclosure suit, and the purchaser at the master's sale, are bound to take notice of the equitable rights of the tenant, if any such exist; such possession being constructive notice to them of his rights. *De Ruyter v. The Trustees of St. Peter's Church*, 555

See PARTITION, 5.

POWERS.

- 1 Where a power in trust, to executors, to lease the real estate of the testator until it can be sold, would have the effect to suspend the absolute power of alienation in such real estate beyond the time allowed by law, it is void. But the power in trust to sell, in such a case, will still be valid. And the real estate, in equity, will be considered as converted into personalty immediately, where such a conversion is necessary to carry into effect the will of the testator, and to prevent injustice to any of the objects of his intended bounty. *Haztun v. Cress*, 508

2. Where a power in trust, to an executor to sell the real estate of the testator, upon the death of the widow, for the benefit of the legatees, is an imperative power, the estate is in equity to be considered as converted, from the death of the widow; so as to give the legatees the same interest in the rents and profits, until the estate is actually sold, as they would have had in the interest of the proceeds of the sale if such sale had been made immediately upon the death of the widow. *Smith v. Kearney*, 533

POWER OF ATTORNEY.

- Where a power of attorney authorizes the person appointed to appoint an attorney *under him*, and to revoke such appointment at his pleasure, the death of the principal attorney necessarily revokes the power of the substitute. *Watt v. Watt*, 371

PRACTICE.

1. Amending bill.

1. A complainant will not be allowed to amend his bill so as to make a new case, after the proofs in the cause have been taken and closed. *Dodd v. Astor*, 395

2. Second application for the same relief.

2. It is out of the usual course of practice to make an application for the same relief, a second time, where the first motion or petition has been denied, upon the merits, without reserving to the applicant the right to renew his application. *De Peyster v. Hildreth*, 109

3. A motion once made and denied upon the merits, without reserving the right to renew it, cannot be made a second time, without leave of the court. *Dodd v. Astor*, 395

3. Terms of granting favors.

4. Where a party, by a slip, has lost the opportunity to set up a mere technical or unconscientious defence, and comes to the court for a favor, which it is necessary should be granted to enable him to set up such a defence, the court of chancery will require him to do

equity, as a condition of granting the favor asked. *Hartson v. Davenport*. 77

4. Appointment of guardians ad litem for infant defendants.

5. A peremptory order, obtained by the complainant, for the appointment of a guardian ad litem for infant defendants, is regular, so far, at least, as to protect the title of a purchaser under the decree in the suit in which such order is made. *Concklin v. Hall*, 136

6. There is no unbending rule of practice, in relation to the appointment of a guardian ad litem for an infant, upon the application of the complainant, where the infant, or his friends, neglect to procure the appointment of a guardian, for him, within twenty days after the return day of the subpoena. *ib*

7. The usual practice is to grant an order nisi, appointing some suitable person guardian ad litem, for the infant, unless the infant shall, within ten days after service of a copy of the order, procure the appointment of another person. *ib*

8. *It seems*; however, it is correct practice, for the complainant to give notice to the infant, at the time of serving the subpoena, where he is of the age of fourteen or upwards, or to his relative or protector, in whose presence the subpoena is served, where he is under that age, that if he does not procure the appointment of a guardian ad litem within twenty days after the return day of the subpoena, the complainant will apply to the court, to appoint a guardian for him, without further notice. *ib*

9. In the case of infants who are absentees, it is a matter of course to make an absolute order, for the appointment of a guardian ad litem for them, without further notice, where they, or their friends, do not procure a guardian to be appointed within twenty days after the expiration of the time limited in the order for their appearance. *ib*

See AFFIDAVITS.
FORECLOSURE SUITS.
INJUNCTION.

PRINCIPAL AND SURETY.

1. Whether one of the defendants in an execution, who is a mere surety for his

co-defendant, has any remedy in the court of chancery against a sheriff who has an execution against both, and who, with the knowledge of the fact that one of such defendants is primarily and equitably liable for the whole debt, neglects to sell the property of the principal debtor, whereby the same is lost; and where such sheriff is subsequently proceeding, upon the execution, against the property of the surety? *Quere. Boughton v The Bank of Orleans,* 458

2. Where the question of primary liability, as between the defendants in an execution, is doubtful, the sheriff is not bound, at his peril, to decide upon the conflicting claims of the defendants to equity, as between themselves. *ib*
3. In such a case, if the defendant who claims to be the surety wishes to have the execution enforced against his co-defendant, who is primarily liable for the payment of the judgment, he should apply to the equitable powers of the court out of which the execution issued, upon due notice to his co-defendant, for a direction to the sheriff to resort to the property of such co-defendant in the first place. *ib*
4. As between the principal debtor and his surety, the property of the former is primarily liable, and should be first resorted to, for the payment of the debt. And where the sheriff, with a full knowledge of the facts, wilfully violates the principles of equity in this respect, the court of chancery, upon a bill filed for that purpose, will relieve the surety, if the surety cannot obtain satisfaction for the injury by an action upon the case against the sheriff. *ib*
5. A valid and binding agreement, by a creditor, with the principal debtor, to stay the proceedings upon a judgment against the latter, if made without the consent of a surety, will, in equity, discharge the surety from any further liability to the creditor. *ib*
6. And if one of two joint sureties assents to such agreement for a stay of proceedings against the principal debtor, he thereby becomes liable, in equity, for the payment of the whole debt, as between him and his co-surety, if it cannot be collected of the principal debtor. *ib*
7. C. and S. purchased a lot of land from M., in their joint names, and gave back

a joint bond and mortgage for the purchase money; C. subsequently conveyed to S. his undivided half of the lot, subject to the payment of that mortgage, and also conveyed his half of other real estate owned by them jointly, for the purchase money of which they had also given their bonds and mortgages, and S. agreed to pay the amounts due upon these several bonds and mortgages, and gave C. a bond of indemnity against the same; S. subsequently conveyed the lot in question to B. with covenants of seisin and warranty, and covenants against incumbrances; S. became insolvent and left the state, and failed to pay the amount due upon the bond and mortgage given to M.; and M. being about to foreclose the mortgage, B. induced him to bring a suit against C. upon the bond, instead of proceeding against the mortgaged premises; a rule nisi for judgment having been obtained, against C. in that suit, he tendered to M. the amount due upon the bond and mortgage with interest and costs, and demanded an assignment of the bond and mortgage to a third person, so that he might be enabled to enforce the collection thereof against the mortgaged premises; M., in collusion with B. refused to receive the money and make the assignment; C. thereupon filed his bill in chancery against M. and B. and obtained an injunction restraining him from proceeding in his suit at law against C. *Held*, that it was immaterial whether, at the time of giving the bond and mortgage, the land or the bond was the principal security for the debt; that the subsequent agreement between C. and S., and the conveyance to the latter, constituted the relationship of principal and surety not only between the parties personally, but also in reference to the interest of F. in the mortgaged premises. *Cherry v. Monro,* 618

8. *Held also*, that the equitable rights of C. and S., under that agreement and conveyance, were the same as though S. had owned the whole lot originally and had mortgaged it to secure his own debt, and C. had joined with him in the bond as a mere surety; that in such a case, as between the owner of the equity of redemption in the mortgaged premises and the surety in the bond, the land would be the primary fund for the payment of the debt; and that if the surety should be called upon by the mortgagees for payment, he

would have the right to be subrogated, in their place, to their remedy against the land for the payment of the debt. *ib*

9. Held further, that it made no difference, in respect to the equitable right of C. to subrogation to the remedy of the principal creditor against the mortgaged premises, that a bond of indemnity had been given to him by S. For being insolvent, his sureties in the indemnity bond had an equitable right to insist that the mortgagee should resort to the mortgaged premises for payment; instead of collecting the debt from C., and thereby charging the same upon them as the sureties of S. *ib*

R

RAIL-ROADS.

1. The statute incorporating the Auburn and Rochester Rail-Road Company vests the title and possession of the land, taken for the purposes of the rail-road, in the corporation. And the owner of the adjacent land has no right to pass over the land thus taken, and cannot cross the rail-road, without being a trespasser; except by virtue of the 10th section of the act of 1838. *Kyle v. The Auburn and Rochester Rail-Road Company*, 489
2. The corporation, under that section of the statute, is bound to permit the owner of the adjacent land to cross the rail-road at convenient and necessary crossing places. But it is not bound to construct viaducts or embankments for that purpose, except such as were designated upon the profile and map of the road, referred to in the third section of the act of April, 1838. *ib*
3. Where the map, plan, and profile, required by the statute to be annexed to the petition of a rail-road company praying for the appointment of a jury of appraisers, show that the road is to be constructed with a viaduct at a particular point, for the convenient passage of the owner of lands which are severed by the construction of the rail-road, or with a bridge to be erected over such road for the same purpose, the jury should assess the damages with reference to such plan of construction. And if the corporation afterwards attempts to deprive the land owner of the benefit of such contemplated viaduct, or other artificial crossing place, the court of chancery will interfere for his relief; in case he has no sufficient remedy at law. *ib*
4. The court, in such a case, would consider the map, plan, and profile, a part of the petition presented by the rail-road company. And the rights of the parties would be the same as if the corporation had been authorized to take the land, for the purpose of constructing a rail-road upon that particular plan; and as if the statute had directed the jury to estimate the damage, to the land owner, in reference to a rail-road constructed in that manner. *ib*
5. Where the plan and profile of a rail-road, annexed to the petition praying for the appointment of a jury of appraisers, do not show that the road is to be constructed with a viaduct, for the passage of the land owner whose land is severed by the road, from his lands on one side of the track to those lying on the other; nor that it is a part of the plan that the road, generally, is to be constructed with viaducts, bridges, and side embankments, for the purpose of enabling the owners of lands which shall be severed by the rail-road to pass conveniently from one side of the road to the other, the jury, in making their assessment of the damages—when there has been no valid and binding agreement between the corporation and the land owners upon the subject—should proceed upon the ground that where any viaducts, bridges, or other artificial facilities will be necessary, for the convenient crossing of the rail-road, the land owners themselves will have to be at the expense of erecting them. And in the absence of any proof to the contrary, a jury of appraisers will be presumed to have acted upon that principle in assessing damages. *ib*

RECEIVER.

1. Bond.

1. Where the bond given by a receiver upon his appointment, is not filed in the proper office, through inadvertence, the court may direct it to be filed *nunc pro tunc*. *Whiteside v. Prendergast*, 471

2. Not discharged by discontinuance of suit.

2. The discontinuance of a suit does not discharge a receiver appointed therein. But it will entitle him to apply for his discharge, and to have his account passed, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability; unless the interests of the defendants require that he should continue in the receivership, to protect their rights. *ib*

3. Where the protection of the rights of a defendant requires the continuance of the receiver, the court will not grant a discharge, although the suit is at an end. But it will require the defendant thus protected to file a bill forthwith, to settle his rights. *ib*

3. Allowances to.

4. A receiver, upon the passing of his accounts, is not entitled to an allowance out of a fund in his hands as receiver, for counsel fees which he has paid on an unsuccessful defence to a suit brought against him by the owner of such fund; nor for the expenses of an unsuccessful appeal brought by him from the decree in such suit. *The Utica Insurance Company v. Lynch*, 573

See CREDITOR'S BILL, 3.

RECORDING ACTS

1 The whole object of the recording acts is to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, &c., which are not recorded; and to deprive the holder of the previous unregistered conveyance, or mortgage, of the right which his priority would have given him at the common law. And the recording of a deed, or mortgage, is only constructive notice to those who have subsequently acquired some interest, or right in the property, under the grantor or mortgagor. *Stuyvesant v. Hall*, 151

2 Where two mortgages upon the same premises are recorded at the same time, and each mortgagee is cognizant of the giving of the other mortgage, at the time that he takes his own, the recording acts have no application to

the case, in respect to the question of priority. *Jones v. Phelps*, 440

RELATIONSHIP.

1. Although a judgment, rendered by a judge who is related to either of the parties in a suit, may not be absolutely void, where there was nothing before such judge to show the existence of relationship, *it seems* the proper course for the judge, where he is satisfied of the fact of his relationship to either of the parties in interest in the suit, is to refuse to hear the cause; unless both parties, upon being informed of the fact, join in a request to him to hear and decide it. *Puddock v. Wells*, 331

2. The only exception to this principle is where the constitution has conferred the jurisdiction upon a particular judge, or tribunal, and no provision is made by law for hearing and deciding the matter in controversy in any other way, where such judge is related to either of the parties. In that case, the constitution being the paramount law, the judge, or tribunal, to whom the constitution has confided the decision of the matter, must from necessity, hear and decide it; to prevent a failure of justice. *ib*

See AFFINITY.
CHANCELLOR.

REVIVOR.

See ABATEMENT AND REVIVOR.

S

SATISFACTION PIECE.

See EXECUTORS AND ADMINISTRATORS, 19.

SCIRE FACIAS

See JUDGMENT, 3.

SEPARATION.

See HUSBAND AND WIFE, V

SHERIFF'S SALE.

The sale of real estate, by a sheriff, upon an execution against the nominal owner thereof, conveys an apparent legal title to the purchaser, which can only be displaced by the evidence of witnesses, whose testimony may soon be lost by lapse of time. A person, therefore, claiming to be the owner of real estate, which has been thus sold under an execution, upon a judgment improperly obtained, may come into a court of equity for the purpose of obtaining a decree to quiet his title to the premises, and to remove the cloud therefrom. *Radcliff v. Rowley*, 23

SPELTER.

See CUSTOM.

STATUTES.

Whether the legislature can rightfully declare that the result of a litigated suit against one person shall be evidence against another, to affect rights of the latter which had accrued previous to the passage of the statute? *Quære. Wood v. Byington*, 387

SUBROGATION.

I It is well settled, as a general principle of equity, that where one person, or his property, stands in the situation of a surety for the payment of a debt, for which payment another person, or his property, is primarily liable, the one who is secondarily liable, upon his paying the debt to the original creditor, is entitled to be subrogated to all the rights and remedies of such creditor, as they then exist, against the principal debtor or his property. *Wilkes v. Hurper*, 338

2 And where the original creditor has even an equitable lien upon the property of the person who is primarily liable to him, such lien may be upheld and enforced, in favor of the substituted creditor, in preference to any subsequent lien or claim upon such property; unless it be a legal lien or title acquired by a bona fide mortgagee, or purchaser, or pledgee, for a valuable consider-

ation, and without notice of the prior equitable right. *ib*

See PRINCIPAL AND SURETY, 8, 9.

SURPLUS MONEYS

See FORECLOSURE SUITS, 16, 17

SURROGATE.

I. JURISDICTION.

1. To call an executor to account.

1. The surrogate, in whose office a will is proved, has jurisdiction to call an executor to account for the proceeds of real estate sold by such executor, under a power contained in the will, and for the rents and profits of such real estate received by him, previous to the sale thereof, under and by virtue of a power in the will of the testator. *Stagg v. Jackson*, 86

2. Where a will directs real and personal estate to be sold by the executors, and makes but one fund of the real and personal property of the testator, for the purposes of the will, neither the executors, nor the estate, should be subjected to the expense of taking two accounts of the same fund, or of different parts thereof; one before the surrogate, and the other in the court of chancery. *ib*

3. In such a case, the provisions of the revised statutes are sufficiently broad to authorize the surrogate to take jurisdiction of the whole matter, and to compel an account by the executors, both as to the personal estate, and the rents and proceeds of the sale of the real estate of the testator, and to decree the payment, to the residuary legatees, of their respective shares. *ib*

4. A contingent limitation over, to other persons, of the capital of shares given to minor children on their arriving respectively at the age of twenty-one, in case the minors presumptively entitled to the same shall die under age, without leaving issue, forms no objection to the jurisdiction of the surrogate to decree an account and settlement of the estate, upon the application of a legatee, and to direct the immediate payment of the share of such legatee, who has become absolutely entitled to the same. *ib*

6. The fact that the shares of minors are held by the executors, in trust, until they shall respectively become of age, only suspends the power of the surrogate to decree a distribution and payment of those shares of the estate, to the legatees, until such minors shall respectively arrive at the age of twenty-one, or die. *ib*

2. To decree the payment of debts.

6 The provisions of the revised statutes authorizing the surrogate to decree the payment of a debt, where the executors or administrators do not think proper to ask for a final settlement of their accounts, are not imperative. *Kidd v. Chapman*, 414

7 Accordingly, where the claim of the creditor is intended to be contested in good faith, and where the same has in fact been rejected or disputed by the executors or administrators, at the time it was presented to them for payment, and the claimant has neglected to proceed at law to establish the validity of his claim, *it seems* the surrogate, in the exercise of a sound discretion, may refuse to permit the claim to be litigated before him, in the first instance upon a direct application of the claimant for the payment of his debt. *ib*

8 The surrogate has the power to decree the payment of a judgment recovered against the testator, in his lifetime, although the executor does not ask for a final settlement of his accounts. *ib*

9. It is not a proper exercise of discretion, on the part of the surrogate, to refuse to proceed further upon the petition of a judgment creditor, for the payment of his debt by the executors of the judgment debtor, where such creditor has sworn, in his petition, that the debt is still due, merely because the counsel for the executors says that his clients dispute the debt. But the answer to such petition should either deny the recovery of the judgment, or should state that it has been reversed, or paid either in whole or in part; and it should be verified by oath. *id*

3. To decide as to validity of claims.

10. It is not only in the power of the legislature to establish a summary remedy for the settlement of the estates of deceased persons, but it has authorized the surrogate to examine and decide as to the validity of all claims against

the personal estate of the decedent, upon an application for the final settlement of the accounts of an executor or administrator. *ib*

4. To direct the sale of real estate.

11. For the payment of executors' expenses.] *It seems* that a surrogate is not authorized to make an order for the sale of the real estate of a decedent, for the mere purpose of paying the executors or administrators the amount of their claim for the expenses of administration; and where there are no existing debts for which the devisees, or heirs at law of the decedent, are liable in respect to the real estate which had come to them, by devise or descent. *Fitch v. Witbeck*, 161

12. For the payment of debts.] The act of April, 1843, does not charge the real estate of a decedent with the costs of the suit in which a judgment, or decree, against his personal representatives, has been obtained. It only makes the judgment, or decree, presumptive evidence of the existence and of the amount, of the debt due from the decedent; for the purpose of an application to the surrogate for an order to sell the real estate. *Wood v. Byington*, 387

13. That statute does not authorize the surrogate to direct the sale of real estate of a deceased debtor to pay costs which had not been awarded, to the creditor, against the decedent, at the time of the death of the latter. *ib*

14. Upon an application to a surrogate, by a creditor whose debt has been liquidated by a decree in chancery, for the sale of the real estate of a deceased debtor, parol testimony cannot be received to show upon what evidence the master based his decision as to particular items of the account, on the reference to take an account in the suit in which the creditor's decree was obtained. But to rebut the prima facie evidence of the correctness of the master's decision, the whole evidence before him should be produced. *ib*

II. APPOINTING GENERAL GUARDIANS OF INFANTS.

15. Upon the appointment of a general guardian for an infant, by a surrogate, the surrogate should ascertain, by the examination of witnesses, the probable amount of the personal estate, and of the income of the realty during the mi-

nority of the infant. And he should direct the guardian to give a bond, with sureties, in double that amount; and should require the sureties to justify in at least the amount of the penalty of such bond. *Bennett v. Byrne*, 216

6. In making an appointment of a guardian for an infant, the true interest of the infant is to be consulted, rather than the interests, or the wishes, of those who are desirous of the guardianship. *ib*

17. The fact that the mother of an infant, upon her death-bed, expressed the wish that a particular relative should adopt such infant and bring it up as his own, and should see that its property was not wasted, should have a preponderating influence with the surrogate, other things being equal, in favor of the appointment of such person as guardian of the infant. *ib*

18. The probability, if a particular person should be appointed guardian of an infant, that the estate will be subjected to the expense of a new appointment, within a very short time, and to the other expenses incident to a change of guardianship, is a circumstance entitled to some weight in favor of the appointment of another person, by the surrogate. *ib*

19. Where a person, applying to be appointed guardian of an infant, is already the trustee of such infant, for the purpose of expending the income of an estate for his support and education, it is a circumstance in favor of his appointment as such guardian; in order that the infant may not be subjected to the expense of separate accounts of the expenditures for his support; the one on the part of the trustee, and the other by the guardian. *ib*

See ACCOUNT.

APPEAL, 1 2.

T

TRADE-MARKS.

See INJUNCTION, 3, 4, 5, 6.

TRUSTS.

1. A trust, created by will, to invest the capital of a fourth part of the residuary

estate of a testator, and to apply the income, or so much as may be necessary, to the support of B. C.'s family and the education of his children, is such an express trust as is authorized by the third subdivision of the 55th section of the article of the revised statutes relative to uses and trusts. For it is a trust to receive the income of the property and apply so much of it as is necessary, to the support of such of the members of B. C.'s family as were in existence at the death of the testator, during the life of B. C., or for a shorter period if he should die before them; and subject to open and let others into the class to be supported from time to time. *Hartun v. Corse*, 506

2. But an implied trust to accumulate a part of the income, of a share of the testator's estate, for children or descendants of B. C. who are not in existence at the time when such accumulation is to commence, or whose right to the accumulated fund is entirely contingent, is void, under the provisions of the revised statutes relative to accumulations. And the surplus income of the trust property, so far as it arises from real estate, or the proceeds thereof, if it is not otherwise disposed of by the will of the testator, belongs to his heirs at law; and so far as it arises from the personal estate, it belongs to his widow and next of kin. *ib*

3. Where a will contains different trusts, some of which are valid, and others void, or unauthorized by law; or where there are distinct and independent provisions as to different portions of the testator's property, or different estates or interests in the same portions of the property are created—some of which provisions, estates, or interests are valid, and others are invalid—the valid trusts, provisions, estates or interests, created by the will of the testator, will be preserved; unless those which are valid and those which are invalid are so dependent upon each other that they cannot be separated without defeating the general intent of the testator. *ib*

4. Accumulations of the income of real estate for the benefit of infants, who are in esse at the time such accumulations are directed to commence, and which accumulations must terminate with the minorities of the respective legatees, are valid. *ib*

See POWERS.

U

LEASES OF TRADE.

See CUSTOM.

USURY.

See MORTGAGE, 1

V

VENDOR AND PURCHASER.

The mere fact that a purchaser of real estate, who has a covenant of warranty from the grantor, is sued for the purpose of recovering the premises, by persons *claiming* title paramount to his deed, will not authorize such grantee to come into the court of chancery for relief against an action at law, for the unpaid purchase money for the premises. *Miller v. Avery*, 582

1. The mere fact of a failure of title in the vendor, affords no sufficient ground for the purchaser's coming into a court of equity for relief, where he has not been disturbed in his possession, and where no suit has been brought against him by the rightful owner of the land. And the bringing of an ejectment suit against the grantee of lands, by persons claiming to have a title paramount to that of the grantor, without establishing the fact that the plaintiff in the ejectment suit is the real owner of the land, affords no sufficient ground for the grantee coming into the court of chancery for relief, against an action at law for the recovery of the unpaid purchase money due to the vendor of the land. *ib*

2. Where the title of the grantor of land was perfect at the time he conveyed the same with warranty, but one of the conveyances through which that title is derived has not been recorded, and the grantee subsequently receives that deed from his grantor under an agreement by him that he will procure it to be recorded, but he neglects to do so; and in consequence of such neglect he loses the title to the land, by its being sold by the sheriff under a subsequent judgment against the grantor in such unrecorded conveyance, it seems

the court of chancery would relieve the covenantor against an action brought against him, on his covenant of warranty, by his grantee. *ib*

VERDICT.

See EVICTION.

VICE CHANCELLORS.

Vice chancellors have no jurisdiction to hear appeals from surrogates, in any case. And an order of the chancellor, referring an appeal of that nature to a vice chancellor, will not confer any jurisdiction upon the latter. *Spear v. Tinkham*, 105

W

WARRANTY.

See VENDOR AND PURCHASER.

WATER POWER.

See DEED, 3, 4, 5, 6.

WILL.

I. EXECUTION OF.

1. *What statute is to be followed.*

1. Where a will was made, and the testator died previous to the revised statutes, but the will was proved, before the surrogate, after the first of January, 1830, and before the passage of the act of May, 1837, concerning the proof of wills, &c. *Held* that the formalities requisite to the due execution of the will were those which were required by the second section of the act of March 5th, 1813, concerning wills; but that the mode of proof must be that which was prescribed by the provisions of the revised statutes, which were in force when the will was propounded for probate. *Jauncey v. Thorne*, 40

INDEX.

2. *Witnessing signature; or acknowledgment thereof.*

2. It is necessary that the attesting witnesses should see the testator, or some one for him, sign the instrument which they are called upon to witness; or that the testator should either say or do something, in their presence and hearing, indicating that he intends to recognize such instrument, or paper, as one which has been thus signed by him, and upon which his name appears, as a valid will; or as having been signed by his authority, for the purposes therein expressed *ib*

3 But it is not necessary that the testator should, in express terms, declare that his name, signed to the will, was so signed by him, or that it was so signed by his authority and direction, and in his presence. *ib*

4. The production of the will, with his name subscribed to it, and in such a way that the signature can be seen by the testator and by the attesting witnesses, and the request of the testator that they should witness the execution of the instrument by him, or as his will, would of itself be a sufficient acknowledgment of his signature, to render the will valid, under the provisions of the act of March 5, 1813, concerning wills. *ib*

3. *Presumption as to due execution.*

5. The most liberal presumptions in favor of the due execution of wills, are sanctioned by courts of justice, where from lapse of time, or otherwise, it might be impossible to give any positive evidence on the subject. *ib*

6. Accordingly, a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact. *ib*

II. PROVING BEFORE SURROGATE.

7. In a proceeding before the surrogate, to prove a will of real estate, under the provisions of the revised statutes, it is not necessary that each witness to such will should be able to swear that all the requisites of the statute,

which was in force at the execution of the will, were complied with. *ib*

8. The statute only requires, in such cases, that it should appear from the proof taken before the surrogate, that the will was duly executed, by a testator who was competent to make a will, and who was free from restraint. *ib*

III. EVIDENCE REQUIRED, ON A BILL FILED TO ESTABLISH A WILL OF REAL ESTATE.

9. Even upon a bill filed to establish a will of real estate, and where the decree is to be conclusive upon the rights of the heirs at law, the court of chancery does not require that each subscribing witness shall be able to recollect, and prove, that all the formalities required by the statute were complied with. *ib*

10. The rule of the English court of chancery is, that upon such a bill, all the subscribing witnesses, if living and competent to testify, must be called by the party seeking to establish the will, and must be examined by him; so as to give the adverse party an opportunity to cross-examine them as to the sanity of the testator, and the circumstances attending the execution of the will. And the rule is the same upon the trial of an issue of *devisavit vel non*, awarded by the court of chancery. *ib*

11. But it is not necessary that all the witnesses should testify to the due execution of the will, and that the testator was of sound and disposing mind and memory at the time of the execution thereof. *ib*

12. Where there is an infirmity in the recollections of the attesting witnesses, as to what took place at the time of the execution of a will, the court will not require positive and affirmative evidence that all the formalities required by the statute were complied with; but will look to all the circumstances of the case, in forming its conclusions of fact upon that subject. *ib*

IV. PROOF OF SIGNATURE OF ATTESTING WITNESSES, WHEN RECEIVED.

13. Where any of the witnesses are dead, or in such a situation that their testimony

cannot be obtained, proof of their signatures is received, as secondary evidence of the facts to which they have attested, by subscribing the will as witnesses to the execution thereof. *ib*

V. CONSTRUCTION OF.

4. Where a testator devised to each of his six children an equal undivided sixth part of his real estate for life, and after the decease of each child devised the same to the children of such child and to their heirs and assigns forever; *Held*, that the devise in remainder was not to such of the testator's grandchildren as should survive their parents, but that one-sixth of the estate

in remainder was given to all the children of each child of the testator, as to a class; that each grandchild, the moment it came into existence, took a vested interest in the remainder, in fee, subject to open and let in after-born children; and that such of them as died leaving issue, transmitted that interest, by descent, to his or her issue, even in the lifetime of the tenant for life, as a vested remainder in fee. But that the parent from whose side the estate came was the heir at law of such of the grandchildren of the testator as had died without issue, after the death of the testator, and in the lifetime of such parent. *Carpenter v Schermerhorn*, 314

